

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN
(INDONESIA/MALAYSIA)**

REPLY

SUBMITTED BY

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

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INTRODUCTION

1. Indonesia's Reply is submitted pursuant to the Court's Order of 19 October 2000 fixing 2 March 2001 as the time-limit for the submission of the Parties' Replies in the case. In accordance with Article 49(3) of the Rules of Court, Indonesia will not in this Reply attempt to recanvass all of the issues in the case. Indonesia will instead concentrate on the principal issues which, at this stage of the proceedings, continue to divide the Parties.

2. Indonesia's position on the issue of sovereignty is straightforward. Indonesia considers that it possesses sovereignty over both islands on the basis of a clear treaty title agreed by the Parties' colonial predecessors, The Netherlands and Great Britain, in the 1891 Anglo-Dutch Convention.

3. Prior to the 1891 Convention, the limits of the respective territorial possessions of The Netherlands and Great Britain (the latter on behalf of North Borneo) in the area were uncertain. Both had acquired their possessions on the basis of grants from the local rulers - the Sultan of Boeloengan in the case of The Netherlands and the Sultans of Brunei and Sulu in the case of Great Britain. However, the precise extent of these rulers' domains were uncertain.

4. The 1891 Convention was inspired by the common desire of The Netherlands and Great Britain to resolve this uncertainty once and for all so as to avoid further controversy. The intention to conclude a convention settling territorial questions both on the Borneo mainland and with respect to offshore islands was made clear during the negotiations leading up to the signature of the Convention and in the proposals which were exchanged between the parties.

5. Contrary to what Malaysia says in its Counter-Memorial, Indonesia does not say that there was a specific dispute concerning the islands between The Netherlands and Britain before 1891¹. Nor does Indonesia maintain that this dispute was resolved in favour of The

¹ MCM, para. 1.5 (b).

Netherlands by virtue of the 1891 Convention². Indonesia's position, which is supported by the terms and context of the Convention itself, the *travaux préparatoires*, the Explanatory Memorandum Map presented to the Dutch Parliament in the course of the Convention's ratification – a map which was known to and acquiesced in by the higher levels of the British Government – and the subsequent conduct of the Parties, is that the 1891 Convention represented a compromise solution between the positions of the Dutch and British both on the mainland and with respect to insular possessions. Certain islands, Sipadan and Ligitan included, were determined to be Dutch by virtue of their location to the south of the 4° 10' N parallel of latitude; others islands lying north of the 4° 10' N line were deemed to be British. As such, the 1891 Convention "favoured" neither one party nor the other.

6. There is a wide array of evidence drawn from the post-1891 Convention period which confirms Indonesia's position. Malaysia has systematically neglected or attempted to downplay the significance of this evidence, but the evidence is of considerable, if not dispositive, value in the case. In addition to the important Explanatory Memorandum Map, it includes a consistent pattern of conduct on the part of the Parties and their colonial predecessors respecting the 4° 10' N line in practice as separating their possessions in the relevant area. In particular, the visit in 1921 of the Dutch warship, the *Lynx*, to Sipadan and Ligitan constituted a clear expression of Dutch sovereignty over the islands. In addition, the conduct of the Parties in granting petroleum licences seaward of the Island of Sebatik, their mutual respect for the 4° 10' N line in erecting navigational aids, and numerous maps prepared by the highly respected cartographic institute, Stanford, on behalf of the BNBC as well as by official Malaysian mapping agencies all attest to their respect for the line established by the 1891 Convention.

7. In its Counter-Memorial, Malaysia has suggested that Indonesia somehow bears an enhanced burden of proof in the case³. There is no justification for such a plea which is in reality no more than a self-serving argument introduced for purposes of colouring the issues in the case. Indeed, it could be argued with greater conviction that it is Malaysia which bears the burden of proving that the legal title acquired by Indonesia under the 1891 Convention was

² *Ibid.*, para. 1.5 (c).

³ *Ibid.*, para. 1.8.

subsequently displaced by Great Britain or Malaysia. But this is mere question begging. In the final analysis it is both Parties which bear the burden of demonstrating that they have the better title to the islands in question. Indonesia is confident that it has more than satisfied this burden while Malaysia has not.

8. The issues that divide the Parties on these points are taken up in Part 1 of this Reply. Chapter I addresses the relevant background to the Convention and its object and purpose. Chapter II then turns to the interpretation of the Convention in the light of its terms and the subsequent practice of The Netherlands and Great Britain, including the Explanatory Memorandum Map and the 1915 and 1928 Agreements. Chapter III ends this part with a discussion of the numerous elements which confirm Indonesia's interpretation of the Convention and Indonesia's title to the islands.

9. In contrast, Malaysia's arguments on the issue of sovereignty are confused and inconsistent. In its Memorial, Malaysia argued that its title was based on three separate, but mutually inconsistent, chains of title. First, Malaysia alleged that Great Britain, or more properly the BNBC, acquired title to the islands pursuant to the 1878 grants from the Sultans of Brunei and Sulu to Messrs. Dent and Overbeck and the 1903 Confirmation of Cession signed unilaterally by the Sultan of Sulu. Second, Malaysia argued that title to the islands as of 1878 did not vest in the BNBC, but rather in Spain which had succeeded to the rights of the Sultan of Sulu in the Sulu Archipelago. That title is said to have been subsequently transferred to the United States in 1900 and then ceded to Great Britain in the 1930 Anglo-U.S. Convention. Third, Malaysia asserted that whatever the status of the legal title, Great Britain administered the islands from 1878 onwards.

10. Clearly, there are serious difficulties in reconciling these positions. How, for example, could legal title vest simultaneously in Great Britain and Spain or, after 1900, in Great Britain and the United States? This perhaps explains why Malaysia has re-oriented its position in its Counter-Memorial. No longer does Malaysia assert that Great Britain (on behalf of the BNBC) acquired a legal title to the islands between 1878 and 1930. Instead, title is alleged to have vested in Spain up to 1900 and in the United States up to 1930. At the same time, Malaysia continues to maintain that Great Britain administered Sipadan and Ligitan despite the existence of a so-called legal title lying elsewhere.

11. In Part 2 of this Reply, Indonesia will focus on the fundamental defects which undermine Malaysia's theory of the case. In Chapter IV, Malaysia's re-orientation of its case away from the argument that Great Britain acquired a legal title to the islands in 1878 will be addressed. Chapter V then summarises the problems which Malaysia faces in trying to demonstrate that the Sultan of Sulu, from whom Malaysia's title allegedly derives, possessed an original title to the islands. Quite simply, there is no evidence of a Sulu title to the islands based on the historic record.

12. In Chapter VI, Indonesia will turn to the newly-formed core of Malaysia's case – that sovereignty over the two islands was passed to Spain in the mid-19th century, thence to the United States under the 1900 Treaty between the United States and Spain, and thence to Great Britain under the 1930 Anglo-U.S. Convention. As Indonesia will show, at each stage of this purported chain of title Malaysia's arguments break down on the facts. Malaysia has not and cannot show that Spain ever considered that it had title to Sipadan or Ligitan. As for the assertion of a U.S. title from 1900 to 1930, Malaysia has simply neglected to address the evidence that exists proving that the United States never advanced a claim to the islands and that it expressly withdrew the 1903 map on which Malaysia's case so heavily depends. Indonesia will address this crucial evidence in Chapter VI. And with respect to the 1930 Convention, Indonesia will also show that this instrument cannot in any way be considered to have resulted in a cession of the islands to Great Britain.

13. Finally, in Chapter VII, Indonesia will return to the flaws inherent in Malaysia's argument that, whatever the status of title to the islands, Great Britain administered the islands from 1878 onwards. It will there be shown that there is no evidence of such administration during the 40 year period from 1878 to 1917, and that even in 1917, when Great Britain issued a turtle egg ordinance with respect to Sipadan, this not only could not have displaced the legal title which The Netherlands had acquired over the islands under the 1891 Convention, but also any such activities are outweighed by the physical manifestation of Dutch sovereignty evidenced by the 1921 visit of the *Lynx* to the islands.

14. This Reply comprises two volumes. Volume 1 constitutes the Reply proper while Volume 2 includes further documentary evidence adduced by Indonesia in support of the arguments it makes in this Reply.

PART 1

INDONESIA'S TITLE TO SIPADAN AND LIGITAN

CHAPTER I

THE OBJECT AND PURPOSE OF THE 1891 CONVENTION

Section 1. Introduction

1.1 It is Indonesia's contention that the 1891 Convention had the result that Sipadan and Ligitan were acknowledged by Great Britain as belonging to The Netherlands. In developing this argument in its Memorial (principally in Chapter V) and Counter Memorial (principally in Chapter V) Indonesia set out its argument on the significance of the Anglo-Dutch Convention of 20 June 1891. At paragraphs 5.65-5.70 of its Memorial Indonesia summarised this part of its case as follows:

- (a) Whatever doubts there might have been up to the late 1880s as to the course of the dividing line between Dutch and British possessions in north-eastern Borneo, with the conclusion and ratification of the Convention of 20 June 1891 between Great Britain and The Netherlands any such doubts were finally set aside.
- (b) The Convention, by its terms, its context, and its object and purpose, established the 4° 10' N parallel of latitude as the dividing line between the parties' respective possessions in the area now in question. The islands presently in dispute - Ligitan and Sipadan - lie to the south of that parallel. It therefore follows that under the Convention title to those islands vested in The Netherlands and now vests in Indonesia.
- (c) By its conduct at the time, and in particular by virtue of the Explanatory Memorandum Map and its contemporaneous variation of the Contract with the Sultan of Boeloengan, the Dutch Government demonstrated its understanding

of the meaning to be attributed to Article IV of the 1891 Convention. It did so by means which were not only public knowledge at the time, but also by means of which the British Government were officially informed. Great Britain's failure to protest, or in any other way to dissent from the Dutch Government's views of which it had such public and official knowledge, showed that it accepted those views as the correct interpretation of the 1891 Convention.

- (d) As envisaged in Article V of the 1891 Convention, further elaboration of parts of the 1891 boundary line was contained in later agreements concluded in 1915 and 1928; but since the 1891 line had been determined by a parallel of latitude its seaward extension did not call for any further precision, nor did circumstances at sea allow for any specific demarcation.

1.2 In its Counter-Memorial Malaysia argues against the position adopted by Indonesia, in the following contexts:

- (1) the background to the Convention¹;
- (2) the negotiations for the Convention²;
- (3) the naval survey of May-June 1891³;
- (4) the interpretation of the Convention⁴;
- (5) the ratification of the Convention, and the Explanatory Memorandum Map⁵;
- (6) the 1915 Agreement⁶.

1.3 In this Chapter Indonesia will consider the first three of these contexts; the last three will be considered in Chapter II.

¹ MCM, paras. 2.4-2.20.

² *Ibid.*, paras. 2.21-2.28.

³ *Ibid.*, paras. 2.29-2.42.

⁴ *Ibid.*, paras. 2.43-2.48.

⁵ *Ibid.*, paras. 2.49-2.59.

⁶ *Ibid.*, paras. 2.67-2.78.

Section 2. The Background to the 1891 Convention

1.4 Indonesia has demonstrated in its Memorial (at Chapters IV and V), that:

- (a) before 1891 there were various uncertainties as to the exact location of the boundary between Dutch and British possessions in North Borneo (which means that the extent and validity of claims and title to territory in the area were uncertain), but
- (b) those uncertainties were brought to an end by the conclusion of the 1891 Convention.

1.5 In other words, the existence of valid claims (whether by The Netherlands through the Sultan of Boeloengan, or by the British through the Sultan of Sulu) was in principle an irrelevance. Nevertheless Malaysia devotes much effort to seeking to establish that before 1891 the Sultan of Sulu had title to Sipadan and Ligitan, and that any claims which the Sultan of Boeloengan had to those islands could not be sustained.

1.6 However, Malaysia's apparent belief that Indonesia's case depends in part upon the validity of the Sultan of Boeloengan's claims to the two islands is not true either as a matter of abstract law or as a statement of Indonesia's position. Malaysia has misunderstood the thrust of Indonesia's argument, and Malaysia's concentration on the extent of pre-1891 local titles is misplaced.

1.7 Moreover, Malaysia has wrongly summarised Indonesia's argument as being that "[t]here was a dispute concerning the islands between The Netherlands and Britain [...] before 1891" and that "[t]he dispute was resolved in favour of The Netherlands by the 1891 Boundary Convention"⁷. But Indonesia has not suggested that there was any specific Anglo-Dutch dispute about the islands, and neither Indonesia nor Malaysia has adduced any evidence

⁷ *Ibid.*, para. 1.5(b) and (c).

that Sipadan and Ligitan were specifically mentioned by either side during the negotiations for the 1891 Convention⁸. There was, rather, a general uncertainty about territorial possessions in the area, involving both mainland possessions and many insular possessions (including but by no means limited to Sipadan and Ligitan), and it was that general uncertainty which was resolved by the 1891 Convention – a resolution which was in Great Britain's favour in respect of territories to the north of the agreed terrestrial boundary line and all islands to the north of the 4°10' N line, and in The Netherlands' favour in respect of all territories and islands (including Sipadan and Ligitan) to the south of those lines.

1.8 Although Indonesia's title to Sipadan and Ligitan does not depend on the Sultan of Boeloengan having title to them, Malaysia for its part acknowledges that its case entirely depends on the alleged rights of the Sultan of Sulu over the disputed islands, which would have been ceded to Spain, then by Spain to the United States and, eventually by the United States to Britain to which Malaysia is the territorial successor. This "chain of title" is described by Malaysia in the following terms:

"Malaysia's claim is *based on* the acquisition by Spain of *the possessions of the Sultan of Sulu*. The islands adjacent to North Borneo which were situated beyond the three maritime league limit of the 1878 Sulu grant, Ligitan and Sipadan among them, remained under Spanish sovereignty. These possessions were transferred to the United States by the Treaty of 7 November 1900. The United States in turn transferred them to Great Britain by the Treaty of 2 January 1930"⁹.

1.9 Consequently, if Sulu had no title over Ligitan and Sipadan, neither Spain, the United States, Great Britain nor Malaysia itself could have inherited any such rights over the islands. As Malaysia puts it:

"Evidently if [Sulu then] Spain had no rights over Sipadan and Ligitan in 1898, there was nothing it could have transferred to the United States by the Treaties of 1898 and 1900"¹⁰.

⁸ ICM, paras. 5.67, 5.68(b) and 5.88.

⁹ MCM, para. 2.2. Emphasis added.

¹⁰ *Ibid.*, para. 3.17.

1.10 As Indonesia will show in Chapter V of this Reply, Sulu had no right to the islands in dispute; they were outside the reach of its effective as well as its "theoretical" sovereignty and Malaysia has not shown *any* trace of administration or presence of Sulu in respect of either Ligitan or Sipadan.

1.11 But there is something more. Even if Malaysia could establish that the islands had belonged to the Sultan of Sulu before 1891, *quod non*, as to which, see Chapter V below, this would be irrelevant: whatever the previous state of affairs, the 1891 Convention would have created a new situation, in accordance with the international law prevailing at the time in matters concerning colonial acquisitions.

1.12 For this same fundamental reason, there is no ground for the assertion repeated by Malaysia according to which:

"Indonesia's claim to the islands depends on its showing (a) that the Netherlands had, through Bulungan, a valid claim to the islands before 1891, *and* (b) that the Netherlands retained sovereignty over them under the 1891 Boundary Convention"¹¹.

Alternatively put:

"Indonesia's arguments [...] depend in the final analysis upon the proposition that the territory of Bulungan in 1890 extended to the islands off the coast of the Semporna peninsula, including Sipadan and Ligitan [...] If the Netherlands did not already hold the islands in 1890, the 1891 Boundary Convention must be irrelevant"¹².

1.13 These allegations are fundamentally flawed since they rest on a serious misinterpretation of the 1891 Convention. Its aim and purpose *was not to cede* territories that both Parties could have claimed for negotiation purposes (while acknowledging that ownership or sovereignty over them was uncertain – as to which, see Chapter VI, Section 3, below), neither was it *to recognise mutually* the pre-existing territorial situation: the 1891 Convention was a sharing of non-European territories between two powers which barely cared

¹¹ *Ibid.*, para. 3.17. Emphasis added.

¹² *Ibid.*, para. 3.29.

about the pre-colonial situation (even though they used treaties or contracts concluded with local rulers as the basis for arguments in their negotiations), which was conducted in such a way as to put an end to their territorial disputes in the region.

1.14 It is apparent from several cases decided by this Court and international arbitral tribunals that the pre-colonial situation has no bearing on the colonial and post-colonial legal status of a territory or its border. Thus, in the case concerning the *Frontier Dispute* the Chamber of the Court recognised that, at first sight, the principle of *uti possidetis*, which consolidated the colonial situation to the detriment of the unity of peoples, "conflicts outright with another one, the right of peoples to self-determination", but it acknowledged that, for good reason, "the principle of *uti possidetis* has kept its place among the most important legal principles"¹³. As this same Chamber said, "the principle applies to the [new] State *as it is*, i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock but does not put back the hands"¹⁴. This holds true for the colonial period and, *a fortiori*, for the pre-colonial period.

1.15 Again, in the case concerning the *Territorial Dispute*, the Court decided that its conclusion "that the Treaty [of 1955 between France and Libya] contains an agreed boundary renders it unnecessary to consider the history of the 'Borderlands' claimed by Libya on the basis of title inherited from the indigenous people, the Senoussi Order, the Ottoman Empire and Italy"¹⁵. The Court added:

"Likewise, the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged, are not matters for determination in this case"¹⁶.

1.16 At a more general level, in its Award of 9 October 1998, the Arbitral Tribunal in the dispute between Eritrea and Yemen rejected the doctrine of "reversion" and stated that:

¹³ *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, ICJ Reports 1986, p. 556, at p. 567, paras. 25-26.

¹⁴ *Ibid.*, at p. 568, para. 30. Emphasis in the original.

¹⁵ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p. 6 at p. 38, para. 75.

¹⁶ *Ibid.*, p. 38, para. 76.

"Whatever may have been the links between the coastal lands and the islands in question [before 1923], the relinquishment by the Ottoman Empire of its sovereignty over the islands by virtue of Article 16 of the 1923 Treaty of Lausanne [...] logically and legally affects any pre-existing title"¹⁷.

1.17 Consequently, Malaysia's efforts in seeking to establish that the Sultan of Boeloengan had no claims to Ligitan and Sipadan, or that any such claims as he might have had cannot be sustained, are misplaced. There can be no doubt that before 1891 there was great uncertainty as to the exact location of the boundary between local sultanates in northern Borneo (and, by way of consequence, between the Dutch and British possessions, since, at the time, both parties relied upon their arrangements with local rulers), which means that both the extent and validity of claims and titles to territory in the area were uncertain. However, it was precisely this uncertainty which was brought to an end by the conclusion of the 1891 Convention. This is precisely what Indonesia wrote in its Memorial (at paragraph 5.1), as correctly quoted by Malaysia in its Counter-Memorial (at paragraph 2.1), which then goes on to misinterpret and distort Indonesia's argument. The conclusion that the 1891 Convention put an end to all territorial disputes in the region "renders it unnecessary to consider the [pre-colonial history] on the basis of title inherited from the indigenous people"¹⁸.

1.18 In other words, the existence of valid claims (whether by The Netherlands through the Sultan of Boeloengan, or by the British through the Sultan of Sulu) is in the event an irrelevance: claims overlapped; the validity of titles was arguable; the significance of acts on the ground was debatable; there were, in short, uncertainties, to which Indonesia will revert in Chapter V, and these uncertainties concerned both the land territory and, probably to a greater extent, the surrounding islands. These uncertainties were the very reason for the conclusion of a Convention in 1891, *and they were set at rest by that Convention*, even if it was under a different form as regards the mainland (and Sebatik) on the one hand, and the islands on the other. In the first case (land delimitation) the Convention resulted in a boundary line, in the second (attribution of islands) it resulted in an allocation of territories on either side of the line.

¹⁷ *Yemen/Eritrea, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, para. 124.

¹⁸ See the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *op. cit.*, at p. 38, para. 75.

1.19 There is nothing strange or unusual in a single instrument operating both ways. As the Chamber of the Court noted in the case concerning the *Frontier Dispute* between Burkina Faso and Mali:

"It is not without interest that certain recent codifying conventions have used formulae such as a treaty which 'establishes a boundary' or a 'boundary established by a treaty' to cover both delimitation treaties and treaties ceding or attributing territory (cf. Vienna Convention on the Law of Treaties, Art. 62; Vienna Convention on Succession of States in respect of Treaties, Art. 11). In both cases, a clarification is made of a given situation with declaratory effect from the date of the legal title [...]"¹⁹.

1.20 Moreover, in the present case, the history of the negotiations shows that:

- (a) both The Netherlands and Great Britain invoked pre-colonial titles allegedly ceded to them by local rulers;
- (b) both acknowledged that those titles and their precise extent were uncertain;
- (c) this did not however impede them in concluding a treaty, the aim of which was clearly to put a final end to their territorial disputes in the area.

1.21 Malaysia has made much of the arrangements made in the years before 1891 by the Dutch regarding the territorial extent of Dutch influence in this part of Borneo. These have to be seen in their context. Thus statements (e.g., in the 1846 Resolution of the Governor-General) renouncing influence over areas north of the River Atas and all islands of the northern coasts of Borneo were made at a time of steady European expansion in the region; even if Sipadan and Ligitan are (despite the local geography) to be treated as being islands of the "northern coasts" of Borneo, limits of influence asserted in 1846 have little bearing on the extent of sovereignty or even influence half a century later, as demonstrated by successive later contracts with the Sultan of Boeloengan.

¹⁹ *Frontier Dispute (Burkina Faso/Republic of Mali)*, *op. cit.*, at p. 563, para. 17.

1.22 Those later Contracts are more significant than Malaysia suggests; or rather the absence of any British protest against them is significant. Even if the 1850 Contract was not formally notified to the British Government, such formal notification is not the only basis for the making of a protest: a Government which has actually acquired knowledge of a matter calling for protest, or which as a reasonably prudent government ought to have known of it, is equally required to protest or have its failure to protest held against it. The later Contract of 1878 was, in fact, formally notified to the British Government on 17 January 1880²⁰, but there is no record of any British protest having been made against it.

1.23 In summary, for the purposes of these present proceedings, the pre-1891 situation is relevant only as background, showing the uncertainties to which overlapping claims gave rise. Even a soundly based and recognised title to territory on the 'wrong' side of the line agreed in the 1891 Convention would now be of no avail to the title-holder; while a soundly based and recognised title to territory on the 'right' side of that line would now be of historical interest only, confirmed as it would be by the terms of the Convention which constitute the present basis for title. The Convention disposed of the question of British and Dutch territorial possessions in North East Borneo once and for all, and after 1891 the question of territorial sovereignty was definitively and comprehensively determined by the terms of the Convention.

Section 3. Negotiations for the 1891 Convention

1.24 Indonesia has described the course of the negotiations leading to the 1891 Convention in its Memorial²¹ and Counter-Memorial²². Without prejudice to the more detailed exposition given in those paragraphs, Indonesia there showed that, starting from the original uncertainty as to the extent of both parties' possessions in the area:

- (a) the parties first accepted as the starting point for the line to separate their possessions the place at which the 4° 10' N parallel of latitude met the coast, i.e. at Broershoek;

²⁰ IM, para. 4.63; MCM, para. 2.9.

²¹ IM, paras. 5.24-5.33.

²² ICM, paras. 5.59-5.76.

- (b) thereafter their practical concerns focussed mainly on the land boundary inland into the mainland of Borneo, and the treatment to be accorded the island of Sebatik and navigation rights around it;
- (c) their final agreement, motivated by a wish to put an end once and for all to their territorial problems in the area, was that, seawards from the coastal starting point at Broershoek, the line dividing their territorial possessions was the 4°10' N line "continued eastward along that parallel" – a line which, passing to the north of Sipadan and Ligitan, established that they belonged to The Netherlands (and now to Indonesia).

1.25 In paragraph 2.22 of its Counter-Memorial Malaysia quotes a comment by Sir Edward Hertslet, to the effect that "the only important point in dispute" was the question of navigation on the Sibuco and numerous other rivers which flow from the interior of Borneo into the sea in Sibuco Bay. It is difficult to see the significance of this observation in the present context.

- (a) In the first place, it was written in a Memorandum dated 9 January 1989, i.e., six months *before* the first meeting of the Joint Commission which was held on 16 July that year and nearly 2½ years before the conclusion of the 1891 Convention²³. It cannot therefore be a statement of what the negotiations - which had not then seriously begun - involved.
- (b) Second, it is apparent that although Sir Edward Hertslet considered this issue as the only important point in dispute, what he was really doing was identifying the "only important point" of substance from the point of view of British negotiating aims: his comment followed and was consequential upon his calling attention, in the preceding paragraph, "to the great importance of not

²³

The memorandum is at MM, Vol. 3, Annex 43.

allowing the Dutch to enjoy the sole right of navigating the Sibuco and the numerous other rivers [...], as to admit such a claim might have the effect of depriving the Company of a large portion of their possessions [...]". Sir Edward Hertslet was not - and could not have been - describing what had in the event proved to have been the "only important point" in the negotiations themselves.

- (c) Third, Sir Edward's January prognosis was proved wrong, in that the two major points actually to occasion considerable dispute in the negotiations were the starting point on the coast for the land boundary, and rights of navigation around the island of Sebatik.
- (d) Fourth, whatever *British* aims might have been, *Dutch* aims need also to be taken into account; and the fact is that the parties did not directly and specifically address the aims of either party but rather set out, as the preamble to the Convention states, to establish a boundary between Dutch possessions and British North Borneo.
- (e) Fifth, if Malaysia's purpose in quoting Sir Edward Hertslet's premature and erroneous observations was to suggest that the British side was not really interested in off-shore islands since he did not mention them as an "important point", it should equally follow that all the other matters *not* mentioned in Sir Edward's quoted observation were not important for the British Government; but this was manifestly not so. Moreover, whatever implications there may be for the British Government's attitude, there can be none whatsoever as to the attitude and interests of the other party to the negotiations, the Netherlands Government. Malaysia cannot use a British statement of the limited point of importance attached by Great Britain to the negotiations which were at the time yet to begin as if it were an objective statement of the "only important point" of dispute which arose during the negotiations.

1.26 Malaysia's reference to Dutch attitudes to the outcome of the negotiations is confused²⁴. Malaysia disagrees with Indonesia's assertion that the Dutch were on the retreat, yielding territory to which they had strong claims, at least as regards the area between Broershoek and Batoe Tinagat. Malaysia has taken Indonesia's assertion out of its context. It was made in the opening paragraph of that part of Indonesia's Memorial which dealt with the negotiations for the 1891 Convention. There, Indonesia was making the *background* point that throughout the second half of the 19th century the history of north-eastern Borneo was characterised by British territorial expansion at the expense of the Dutch. It was in this sense that Indonesia observed that in effect the Dutch were on the retreat, even yielding territory to which they had strong claims, and that the eventual 1891 Convention had to be seen against that general background.

1.27 Indonesia stands by its brief, general characterisation of the history of the late 19th century in the north-eastern Borneo area: and indeed, Malaysia does not deny Indonesia's general proposition.

1.28 What Malaysia does seek to deny is the particular application of the general proposition to the area between Batoe Tinagat and Broershoek – an application, it is to be noted, which Indonesia did not itself make. Although Malaysia is not specific about the nature of its denial, it appears to be possibly two-fold: first, that The Netherlands was not on the retreat in the area between Batoe Tinagat and Broershoek, and second, that The Netherlands did not have strong claims to that area. On both counts Malaysia is wrong.

- (a) As to the first, it is demonstrably the case that in falling back from a claimed position on the coast at Batoe Tinagat (and further north inland) to the eventually agreed position on the coast where it is crossed by the 4°10' N parallel of latitude, The Netherlands was 'retreating'.

²⁴

In MCM, para. 2.23.

- (b) As to the second, it is equally undeniable that the Dutch had claims to the area up to at least Batoe Tinagat on the coast (and considerably further north inland), and considered them to be strong²⁵ - certainly strong enough to be put to the British as a clear claim line on an official map. Nothing said in the Dutch Explanatory Memorandum or in Parliament contradicts that state of affairs.

1.29 Malaysia relies on three passages: none of them serves to contradict the existence of strong Dutch claims in the region in question.

- (a) The first passage, from the Explanatory Memorandum, says that the Dutch were seeking a settlement which would provide a correctly described borderline: that is true (and shows that a principal Dutch aim in the negotiations did indeed differ from that set out by Sir Edward Hertslet for the British - see paragraph 1.25, above), but has nothing at all to do with the strength or otherwise of Dutch claims to the area between Batoe Tinagat and Broershoek (but, incidentally, Indonesia notes with satisfaction that Malaysia has drawn attention to the important statement in the Explanatory Memorandum that the Dutch aim was to settle a borderline which "puts an end to all difficulties in the future": as to the significance of this statement, see paragraphs 5.56, 5.58 to 5.60 of Indonesia's Memorial, and paragraphs 5.30(e), 5.39, 5.69 and 5.88(c) of its Counter-Memorial, and below, paragraph 2.10).
- (b) The second passage was from words spoken by the Dutch Minister of Foreign Affairs, that the Dutch were not "giving up territory that undoubtedly belongs to us". The Minister was here reassuring Parliament that *undoubtedly* Dutch territory still belonged to The Netherlands; i.e., what was being given up was only territory to which the Dutch had claims, and claims which the Dutch

²⁵

See IM, para. 5.9.

acknowledged were arguable. It is thus incorrect for Malaysia to say, in its summary at paragraph 2.28(b), that "the Netherlands Government strongly denied that it was yielding any territory": it was acknowledged that some *claimed* territory was being given up, and it was only "undoubtedly" Dutch territory which had not been yielded.

- (c) The third passage, from the Explanatory Memorandum, was that the agreed boundary was more favourable for the Dutch than the British desired. This neither denies that the Dutch were, in general or even in the specific Batoe Tinagat-Broershoek area, on the retreat, nor does it say anything about the strength of Dutch claims in that area: all it indicates is that the British wanted to push the Dutch even further south, but that the Dutch negotiators had been able to resist them.

1.30 At paragraph 2.24 of its Counter-Memorial, Malaysia dissents from Indonesia's view that the Joint Commission's proposal for the boundary to pass between the islands of Sebatik and East Nanoekan "clearly envisaged [the boundary] in principle as one which, starting on the coast, ran eastwards *at sea* for an indeterminate distance, [...] i.e. out to the open sea"²⁶. Malaysia states that the proposal was British, made by Sir Philip Currie: but that in itself is no reason why the effect of the proposal was not as Indonesia has described it. Malaysia, however, adds that had it been the intention of the British Government that the boundary should continue out to the open sea, "Britain would have singled out the issue when Count de Bylandt finally rejected the proposal". Malaysia gives no grounds at all for such an assertion, which in any event is (a) a *non sequitur*, and (b) pure speculation. In fact, the consistent view of the negotiators that the eventual line would continue out to sea has been clearly shown by the further material in Indonesia's Counter-Memorial, at paragraphs 5.70 to 5.75. Malaysia's summary of its position on this point, at paragraph 2.28(e) of its Counter-Memorial, that there was never any question of a line running eastwards out to the open sea, is thus incorrect.

²⁶ At *ibid.*, para. 5.23.

1.31 Its incorrectness is further demonstrated by the internal minuting in the British Foreign Office in preparing the proposal eventually put forward in the negotiations for the 1891 Convention and referred to at paragraphs 5.73-5.74 of Indonesia's Counter-Memorial. This minute²⁷, clearly pursuing the British proposal that the matter be settled by a compromise and Dutch acceptance in principle of that idea²⁸, set out the prospective British compromise as follows:

"Starting Eastward from a point A on the coast near Broers Hoek on parallel 4° 10' of North Latitude, the line should follow that parallel until it is intersected by the Meridian of 117°39' East Longitude, opposite the Northernmost point of the Island of East Noenoekan, at the point marked B; it would then follow in a straight line midway between the Islands of Sebatik and East Noenoekan in a South Eastern direction to the point of the intersection of the 4th Parallel with the Meridian 117°50' East Longitude, opposite the Southernmost point of the Island of Sebatik at the point marked C. The line would continue thence in an Easterly direction along the 4th parallel, until it should meet the point of intersection of the meridian of 118°44'30" marked D"²⁹.

The British line is plotted on the sketch map overleaf as well as on Map 4 in Indonesia's Map Atlas, an historical map prepared by Stanford to illustrate the proposals being exchanged. It is readily apparent that points C and D are both off-shore, and that point D in particular extends well to the east of Sipadan. Although this particular proposal (which adopted 4° N as the latitudinal line to be followed) was not that which in the event was agreed, it shows compellingly that on the British side during the negotiations it was envisaged that the line dividing British and Dutch possessions should follow a line of latitude for a very considerable distance out to sea (see also below, paragraph 2.15). Moreover it shows that a British proposal which would have left Sipadan on the British side of the then-envisaged 4° N line was dropped in favour of the line eventually agreed at 4° 10' N, so leaving both islands now in dispute to The Netherlands.

²⁷ See *ibid.*, Vol. 2, Annex 56, at pp. 474-475, reflecting the language referred to in the next following footnote.

²⁸ See *ibid.*, paras. 5.19-5.20 and IM, Vol. 3, Annex 59, at p. 458.

²⁹ *Ibid.*, Vol. 2, Annex 56, at pp. 475-477. It should be noted that, unfortunately, the pages here have been reproduced in the incorrect order: they should be read in the order 475-477-476.

1.32 At paragraph 2.26 Malaysia makes much of the order in which the negotiations dealt with the three issues of the coastal starting point of the boundary, its westward extension and its eastward extension. That order of treatment was simply a matter of negotiating convenience, although fixing the coastal starting point at the outset had a certain logic to it. Apart from its negotiating convenience, the *order* of treatment has absolutely no implications for the *substance* of what was eventually agreed: whether the eastward continuation of the 4° 10' N line was dealt with before, or after, the westward continuation of the land boundary is wholly without significance for the question whether or not that line continued eastwards beyond the east coast of Sebatik. That point of substance can only be determined by the terms of the 1891 Convention.

1.33 At paragraph 2.27 Malaysia seeks support for its position in certain observations made in the Award in the *Guinea-Guinea Bissau* case. While Malaysia asserts some similarity between the circumstances there under consideration and those of the present case, in reality no such similarity exists.

- (a) Malaysia refers to something which "the French Government had mentioned during the ratification debate" (i.e., the ratification debate of a French-Portuguese Convention concluded in 1886): but in fact, the words in question were not those of the Government nor were they made during the debate, but merely appeared in "an internal note of the French Ministry of Foreign Affairs dated 12 June 1887, concerning discussion of the ratification of the Convention by Parliament"³⁰.
- (b) The arbitration concerned a different issue from that presently under discussion. Article I of the 1886 Convention³¹ had provided that "the boundary separating the Portuguese possessions from the French possessions will follow"

³⁰ Award of 14 February 1985, *Guinea-Guinea (Bissau) Maritime Delimitation Case* (1985), ILR 77, p. 636 at pp. 666-7, para. 61 (English text).

³¹ The text of the Convention as ratified is set out in para. 45 of the Award, *ibid.*, at pp. 659-660.

a course prescribed in detail in the Article; this course included a course at sea establishing what became known as the 'southern limit'. The question at issue was whether Article I established the maritime boundary between the respective possessions of France and Portugal in West Africa. The Tribunal answered this question in the negative³². That question is different from the question of territorial sovereignty over insular possessions which is at issue in the present case.

- (c) The observation in the French Foreign Ministry's internal note which is cited by Malaysia was referred to in the Award as a possible exception to the Tribunal's finding that:

"none of the documents presented by the Parties has proven to the Tribunal that in the course of the colonial period France and Portugal considered the "southern limit" referred to in the final paragraph of Article I of the 1886 Convention as a general maritime boundary between their possessions"³³.

The Tribunal concluded that the internal note, although referring to "islands situated along the coast" (but without naming them), seemed only to allude to "the coastal islands, indubitably situated in territorial waters". In its context the Award was merely stating that the reference in the French internal note to islands within territorial waters could not be taken as indicating that the lines established by Article I of the Convention were treated by France as providing for a general maritime boundary. The Tribunal was *not* asserting, as Malaysia appears to suggest, that agreement upon a line extending out to sea only affects coastal islands clearly situated in territorial waters.

- (d) It may be noted that Article I of the 1886 Convention constituted what might nowadays be referred to as an 'allocation treaty': it prescribed a line - referred to as a "boundary" - "separating the Portuguese possessions from the French possessions", and it did so by reference to parallels of latitude or meridians of

³² *Ibid.*, at pp. 668, 674, paras. 67, 84.

³³ *Ibid.*, at p. 666, para. 61.

longitude. No question as to territorial sovereignty of islands lying on one side or the other of those lines was in issue in the arbitration, the only question being, as stated above, the determination of a maritime boundary.

Section 4. The Naval Survey of May-June 1891

1.34 Indonesia has explained the circumstances of this survey of areas relevant to the present dispute by two British naval vessels (HMS *Egeria* and HMS *Rattler*) and one Dutch naval vessel (HNLMS *Banda*) in mid-1891³⁴.

1.35 The main elements were as follows:

- (i) The proposal for the survey was raised with the Dutch Government following instructions sent by the British Foreign Office on 29 December 1890 to the British Minister in The Hague³⁵;
- (ii) the Dutch Government had no objections, but were unwilling to let British vessels carry out the survey on their own: they wished to be associated with it and made their own proposals as to the tasks to be undertaken³⁶;
- (iii) HMS *Egeria* arrived in the area in March 1891, arriving at Sandakan on 14 March 1891, and was instructed to survey the coast and islands around Darvel Bay³⁷;
- (iv) HMS *Egeria* surveyed Sipadan and Ligitan, and established stations on Mabul and Sipadan, during May 1891³⁸;

³⁴ IM, paras. 5.34-5.40.

³⁵ *Ibid.*, para. 5.34.

³⁶ *Ibid.*, paras. 5.34-5.36.

³⁷ MCM, paras. 2.35-2.36.

³⁸ IM, para. 5.39; MCM, paras. 2.37, 2.39.

- (v) on 1 June the *Egeria* met up with the *Rattler* and *Banda* near Broershoek, to erect beacons on the 4° 10' N parallel where it crossed the coast of Borneo and the west and east coasts of Sebatik, and to explore the Simengaris River³⁹;
- (vi) on 27 June the *Egeria* returned to Sandakan, and after 2 weeks rest continued her survey activities⁴⁰;
- (vii) the *Egeria* stayed in the area until 27 August 1891⁴¹;
- (viii) the *Egeria* returned to resume the survey of Darvel and St. Lucia Bays from 28 March to 29 August 1892⁴², visiting Ligitan during her cruise, although despite Malaysia's assertion to the contrary, there is no mention of a visit to Sipadan either in Commander Field's account in the *British North Borneo Herald*⁴³ or in the Notes at Annex 90 of Indonesia's Memorial⁴⁴.

1.36 The reason why it was proposed that the survey should be undertaken when it was (May-June 1891) was that the British Admiralty considered that the healthy season in the region ended at the end of July and it was necessary (if the survey was to be undertaken in 1891) that it be undertaken before then as thereafter no British naval vessels would be in those waters⁴⁵.

1.37 As Malaysia notes⁴⁶, and as Indonesia stated in its Memorial⁴⁷, the original initiative for the *Egeria's* survey came in December 1890 from the British side, although it was limited to the fixing of the 4° 10' N point on the mainland coast: the suggestion for also exploring the Rivers Simengaris and Soedang came from the Dutch, on 28 January 1891⁴⁸, as did the

³⁹ IM, paras. 5.35, 5.38; MCM, para. 2.39.

⁴⁰ IM, Vol. 3, Annex 89, p. 232.

⁴¹ MCM, para. 2.36.

⁴² As to the limited, non-landing nature of the "visit" see below, para. 1.44.

⁴³ IM, Vol. 3, Annex 89, pp. 233-235.

⁴⁴ *Ibid.*, Vol. 3, Annex 90, at p. 246; see IM, para. 5.39 and MCM, paras. 2.36 and 2.40.

⁴⁵ Letter of 25 February 1891 from Mr. MacGregor (Admiralty) to the Foreign Office: IM, Vol. 3, Annex 69, at p. 79.

⁴⁶ MCM, para. 2.30.

⁴⁷ IM, para. 5.34.

⁴⁸ *Ibid.*, para. 5.34.

suggestion for fixing the 4° 10' N points on the west and east coasts of Sebatik, on 7 April 1891⁴⁹. Thus it is apparent that this whole exercise was conceived well before the 1891 Convention was concluded on 20 June 1891, and also before the 4° 10' N line had been finally agreed as the limit for British and Dutch possessions in Borneo: identifying the various locations on the 4° 10' N line was a useful contingency exercise, given the possibility that that line might subsequently be agreed to be the boundary. The Dutch Foreign Minister's letter of 20 January 1891 had referred to "la possibilité que ce point [le point sur la côte où se trouve le parallèle 4° 10' latitude sud *[sic]*] soit adopté par la suite comme point de départ de la limite entre les possessions Néerlandaises et Anglaises..."⁵⁰. Malaysia itself acknowledges that "the boundary was not yet decided at the time of the survey"⁵¹. The British initiative had accordingly been correctly expressed to be "without prejudice" to the conflicting British and Dutch claims⁵², the resolution of which had not, at that time, been achieved.

1.38 Malaysia notes that "there was no question of extending the scope of the combined expedition to any other islands [i.e. other than Sebatik]"⁵³. The reason is simple: the principal purpose of the survey was to establish where the 4° 10' N line met relevant coasts, and no other islands (and in particular Sipadan and Ligitan) were crossed by that parallel.

1.39 Malaysia further notes that the joint survey ended with the departure of HNLMS *Banda* on 21 June, and that "There was never any question of the *Banda* demarcating a maritime boundary further east, let alone visiting Ligitan or Sipadan"⁵⁴. Indonesia must recall that:

- (a) the survey did not have the purpose of "demarcating a maritime boundary" at all;

⁴⁹ MCM, para. 2.32.

⁵⁰ IM, Vol. 3, Annex 65.

⁵¹ MCM, para. 2.34.

⁵² IM, para. 5.34.

⁵³ MCM, para. 2.32.

⁵⁴ *Ibid.*, para. 2.33.

- (b) in any case, "demarcation" of a line in the open sea was not physically possible;
- (c) indeed, no maritime *boundary* in the high seas existed at that time and therefore no boundary "demarcation" would have been permissible even if possible;
- (d) at the time of the survey no line dividing British and Dutch possessions in the area had been agreed, and therefore any purported "demarcation" would not only have been inappropriate but would also have been premature;
- (e) nor was any physical identification of a line necessary, since the line then in mind, and subsequently agreed upon, followed a defined parallel of latitude, which was all that was needed;
- (f) the survey's purpose did not call for any visit to Ligitan or Sipadan, since neither was crossed by the 4° 10' N line; and
- (g) the limitation of the *Banda's* survey activities to the coastal areas of the mainland and the east and west coasts of Sebatik at or near the 4° 10' N parallel in no way means that the 1891 Convention was similarly limited, as suggested by Malaysia⁵⁵. The survey was limited to that area because that was the limit of the specific task given the survey vessels, which as explained was all that was necessary or appropriate: that task was given to them on a contingency basis *before* the 4° 10' N line had been agreed and the Convention concluded in June 1891. It is impossible to use such a survey as a basis for the interpretation of a text which was only negotiated and agreed later.

1.40 Malaysia notes that the *Egeria* visited Sipadan in May 1891 (on its way to the rendezvous with the *Rattler* and *Banda*), and that the British gave no notice to the Netherlands Government as this was undoubtedly British territory. That might indeed have been the

⁵⁵ *Ibid.*, para. 2.42.

British view, for at that stage in the negotiations, before the 4° 10' N line had been agreed, Great Britain would no doubt have acted in accordance with its view of the situation - just as the Dutch, in establishing their station at Batoe Tinagat in September 1879⁵⁶, acted in accordance with *their* view of the situation on land without seeking permission from the British authorities. Such British actions, of which there is no record that the Dutch had any knowledge and were therefore in no position to protest, do not establish Dutch acquiescence in British authority over Sipadan. In any event, such actions of the two States before June 1891 say nothing about the scope of the agreement *later* reached in the 1891 Convention: they were actions taken in pursuit of asserted rights which were still being maintained at the times in question, the conflicts in relation to which were only later resolved by agreement upon the Convention line.

1.41 Malaysia acknowledges (as Indonesia had already noted at paragraph 5.36 of its Memorial) that the Dutch were directly engaged in maritime activities in the area and were unwilling to let British naval vessels carry out such activities on their own⁵⁷. Malaysia, however, seeks to limit the truth of this statement to the survey of territory claimed by the Dutch and of the proposed boundary with British North Borneo, and denies its correctness for territory and islands to the east, which were said by Malaysia to be administered by British North Borneo, including Ligitan and Sipadan. That Malaysian attempted limitation lacks weight: in the first place, it once again involves a mere assertion that at that time Sipadan and Ligitan were actually being administered by the BNBC – such bare assertions, unsupported by any evidence of administration of those two islands by the BNBC, is characteristic of Malaysia's arguments in this case; and second, the incident in 1876 involving HNLMS *Admiraal van Kinsbergen* and the island of Mabul⁵⁸ (north of Sipadan) shows that Dutch maritime activities in the area were by no means limited to the kind of in-shore areas suggested by Malaysia. Similarly, Sir Rutherford Alcock (BNBC) wrote to Sir Julian Pauncefote (Foreign Office) on 11 January 1884, complaining that "Dutch men-of-war are cruising in our waters, north of the boundary they themselves claim, viz. Batu Tinagat"⁵⁹. A

⁵⁶ IM, para. 5.3.

⁵⁷ MCM, para. 2.38.

⁵⁸ ICM, para. 5.42.

⁵⁹ Annex 2 to this Reply.

glance at a map of the area shows that this is a reference to the waters off the south coast of Semporna and thus north of Sipadan and Ligitan. These demonstrations of Dutch maritime activity are consistent with the observation in the Admiralty Pilot (1890 edition)⁶⁰ that, as regards Sebatik, "The only information we have of this locality is from the Dutch chart".

1.42 In paragraph 2.39 of its Counter-Memorial Malaysia suggests that during the joint activities of the *Egeria*, *Rattler*, and *Banda*, the British and Dutch officers were, in conversation, "bound to have touched upon the survey of the *Egeria* in the preceding weeks", and that the Dutch officers "did not consider it worth mentioning in their report" or protesting at such a unilateral British survey of Dutch islands and waters. Indonesia would observe that:

- (a) the premise on which this argument rests (that there was "bound to have been" discussion of the *Egeria's* previous survey work) is, again, pure speculation;
- (b) if the fact of such discussion was not mentioned in the Dutch report, it was also not mentioned in the reports submitted by either the *Egeria* or the *Rattler*, who must similarly have regarded the matter as of no importance (or as something about which it was better to keep quiet);
- (c) in the absence of any evidence of knowledge on the part of the Dutch crew of the *Banda* that there had been a British survey of Dutch-claimed waters around Sipadan (and it has to be borne in mind that the normal route to the rendezvous point would in any event have taken the *Egeria* past Sipadan), no significance can be attached to any absence of Dutch protest;
- (d) similarly, in the absence of any evidence of Dutch knowledge of British transgressions into Dutch-claimed waters, the general cordial relations between the British and Dutch vessels is no matter for surprise;

⁶⁰ MCM, Vol. 2, Annex 1, at p. 190.

- (e) in any event, at the time the situation in this area regarding sovereignty was essentially one of competing *claims*, without the certainty which would later follow after the conclusion of the Convention, and attitudes of naval personnel on the spot would be likely to have taken that into account; and
- (f) any lack of complaint by the Dutch naval authorities (had any complaint based on knowledge been called for, which it was not) is mirrored by the lack of British complaint when HNLMS *Macasser* sailed into British waters in 1903: as Malaysia explains, "Collaboration was necessary for a complete survey of the coast to establish reliable navigation charts, and relations between the officers were good"⁶¹.

1.43 In assessing the significance of these naval survey operations one general point must be borne in mind. This is that "Given the limited resources available, the colonial powers were more intent on collaboration than on affirmation of respective sovereignties on these small and often featureless islands". Those words are Malaysia's: at paragraph 4.7 of its Counter-Memorial. Moreover, as with the erection of lighthouses, naval surveying is more a matter of the promotion of the safety of navigation than of a manifestation of sovereignty⁶².

1.44 The return journey of HMS *Egeria* in 1892 during which she visited Ligitan although probably not Sipadan⁶³ has to be seen in that light – particularly since, from the evidence relied on by Malaysia⁶⁴, the "visit" does not appear to have involved any landing on the island but rather just navigation in their vicinity. There is no evidence that the Dutch authorities knew of this voyage, which in any event was undertaken en route to/from checking the beacons on Sebatik. Such a survey voyage cannot be seen as evidence in support of Malaysia's contention that British sovereignty extended to the islands now in dispute.

⁶¹ MCM, para. 4.7.

⁶² See ICM, paras. 7.41-7.42.

⁶³ See above, paragraph 1.35(viii).

⁶⁴ Namely, IM, Vol. 3, Annex 90, pp. 242, 245.

Section 5. Conclusion

1.45 As shown in this Chapter,

- (a) the uncertainties as to the limits of British and Dutch territorial possessions in the region were settled by the 1891 Convention;
- (b) the parties wanted by the Convention to settle *all* their differences in the area;
- (c) for the offshore area they did so by adopting the 4° 10' N line.

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CHAPTER II

INTERPRETATION OF THE 1891 CONVENTION IN THE LIGHT OF THE SUBSEQUENT PRACTICE

Section 1. The Terms of the Convention

2.1 Malaysia devotes paragraphs 2.43-2.48 of its Counter-Memorial to the interpretation of the Convention, attempting to discredit Indonesia's interpretation advanced in its Memorial.

2.2 Indonesia reads the 1891 Convention, according to the natural and ordinary meaning of its terms *in their context* and *in the light of the object and purpose of the Convention*, as dividing British and Dutch possessions along the boundary delimited in the Convention according to the terms of which, from the stipulated point on the east coast of mainland Borneo, it is "continued eastward" along the 4°10' N parallel in such a way as to attribute islands to the north of that line to Great Britain and islands to the south of that line (including Sipadan and Ligitan) to The Netherlands. Malaysia claims that the agreed boundary stops at the east coast of Sebatik.

2.3 The foregoing statement of the Parties' positions mirrors that put forward by Malaysia at paragraph 2.45 of its Counter-Memorial: the passages emphasised above are relevant phrases omitted from Malaysia's summary statement of the Parties' essential positions. Their omission is revealing as to aspects of Indonesia's argument with which Malaysia feels uncomfortable (indeed, Malaysia elsewhere has also, by an omission from a quoted passage, sought to disregard the relevance of the Parties' aim in concluding the Convention – see below, paragraphs 2.8-2.10).

2.4 Malaysia, at paragraph 2.46 of its Counter-Memorial, repeats its earlier argument that the order in which the negotiating process dealt with the boundary was reflected in the order of Articles I to IV of the Convention, and that that somehow affects the meaning of those Articles (and of Article IV in particular). It does not: see above, paragraph 1.32.

2.5 Malaysia seeks to show that because the Convention refers to a "boundary" line, it must be limited only to a boundary on land, excluding any continuation out to sea¹. Indonesia has shown that use of the term "boundary" is not limited to land territory².

2.6 Malaysia seeks to show that because the Convention uses the word "continue" in relation to the westward boundary (which does not extend out to sea), the use of the same word in Article IV similarly excludes continuation out to sea³. But Malaysia misses the important point (explained at paragraph 5.20 of Indonesia's Counter-Memorial) that the westward Article (Article II) stipulates that the westward boundary "continues" westward *to a specified point*, whereas Article IV contains no such terminal point: the reason is that at the western end of the land boundary there were no islands near the shore, and the more distant islands (the South Natuna islands) were indisputably Dutch. This difference between Articles II and IV is clearly illustrated on the Explanatory Memorandum Map.

2.7 Malaysia seeks to deny the extension of the 4°10' N line eastward of Sebatik by asserting that the island of Sebatik is the limit of the line's eastward continuation⁴. But this is to assert what has to be proved. That Article IV did deal with the island of Sebatik is not in dispute: that it dealt *only* with that island, and with no other islands north or south of the agreed line, is at the heart of the dispute. Assertion is not even argument, let alone proof.

2.8 Malaysia's representation of Indonesia's fourth argument, at paragraph 2.47(d) of its Counter-Memorial, is simply wrong because it is incomplete, and as a result Malaysia has wholly misunderstood Indonesia's argument. Malaysia states the Indonesian argument in the following way:

"Fourth, given the Dutch belief that the territories of the Sultan of Boeloengan included various islands, including certain islands adjacent to the main islands of Tarakan, Nanoekan and Sebatik, an interpretation which would leave open the question of attribution of various small offshore islands would be inconsistent with that purpose".

¹ MCM, para. 2.47(a).

² ICM, paras. 5.8, 5.12; and see also paragraph 1.33(d), above.

³ MCM, para. 2.47(b).

⁴ *Ibid.*, para. 2.47(c).

That purported statement is meaningless, since the last two words ("that purpose") have nothing to refer back to. It is also incomplete, although Malaysia gives no indication that words have been omitted from the quotation.

2.9 The correct statement of Indonesia's argument, as put in its Memorial at paragraph 5.43(d), is as follows (with the words omitted from the Malaysian version in italics):

"Fourth, given the Dutch belief that the territories of the Sultan of Boeloengan included various islands, including certain islands adjacent to the main islands of Tarakan, Nanoekan and Sebatik, *and the desire on both sides to settle the boundary problem once and for all (as to which see, also, paras. 5.56-5.59, below)*, an interpretation which would leave open the question of attribution of various small offshore islands would be inconsistent with that purpose".

2.10 Thus the crucial point in the Indonesian argument is not just that the Dutch believed that they had good claims to various islands, but also that it was the common intention to settle all such problems for the future⁵. The importance of a main purpose of the Convention being to put an end to *all* future territorial disputes in this area cannot be underestimated when seeking to interpret its terms: it is a purpose shared by Great Britain, whose early proposal for a settlement was for "a compromise of *all* conflicting claims"⁶. In addition to the wish to avoid future disputes, there was also concern as to the possible future complications from other States. As the Dutch Foreign Minister observed in discussion with the British Minister at The Hague, it was:

"desirable [...] that the two Powers [...] should come to a *complete* understanding which would not leave room for any third Power to step in at any time and claim territory there as being *res nullius*. We had, he said, in our negotiations with Spain for the surrender of her claims on the Northern part of the Island, sufficient experience of the difficulties we might have to deal with"⁷.

⁵ IM, paras. 5.43(d), 5.56-5.59; ICM, para. 5.39.

⁶ IM, para. 5.7. Emphasis added.

⁷ Sir H. Rumbold's despatch of 19 November 1888 to Lord Salisbury, IM, Vol. 2, Annex 35, p. 299, at pp. 304-305. Emphasis added.

An interpretation which would leave the status of various claimed islands (both north and south of the agreed line) unclear would not be consistent with that manifest purpose underlying the settlement achieved by the Convention.

2.11 The obvious political intention to settle these North Borneo territorial matters once and for all is fully consistent with views expressed by the Court. In several cases involving the application of boundary agreements where no extraneous questions of validity or applicability have been in issue, the Court has affirmed a general presumption that boundary settlements are intended to be both comprehensive and final.

2.12 The observations of the Court in the case concerning *Sovereignty over Certain Frontier Land* have been noted previously by Indonesia⁸, as have those of the Permanent Court in its 1925 Advisory Opinion on the *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne*⁹.

2.13 To similar effect the present Court, in the *Temple of Preah Vihear*, noted that:

"In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality"¹⁰.

Again, in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the Court considered that the Treaty before it - the 1955 Treaty between Libya and France - "was aimed at settling all the frontier questions, not just some of them"¹¹. In reaching that conclusion the Court observed that

"In the expression [in Article 3] 'the frontiers between the territories...', the use of the definite article is to be explained by the intention to refer to all the frontiers between Libya and those neighbouring territories for whose international relations France was then responsible"¹².

⁸ IM, para. 5.60, at p. 94.

⁹ *Ibid.*

¹⁰ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6 at p. 34. See also IM, para. 5.59.

¹¹ *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6 at p. 24, para. 48.

¹² *Ibid.*

The use of the definite article in the preamble to the 1891 Convention ("defining *the* boundaries between *the* Netherlands possessions in the Island of Borneo and *the* States in that island which are under British protection": emphasis added) similarly reveals the intention of the parties to allocate *all* the territories in the area, not just some of them¹³.

2.14 Malaysia nevertheless appears to suggest that an interpretation of Article IV which would put on the Dutch side of the line islands which were some 50 miles offshore is in some way "wild" and not to be countenanced¹⁴. Yet, to take two other well-known treaties applying to the same region, both the U.S.-Spain Peace Treaty of 1898, and the Anglo-U.S. Convention of 1930, both of which are relied on in other contexts by Malaysia, attribute to the one party or the other small islands falling within the scope of the treaty even though they are in several instances 50 miles *or more* away from the nearest mainland or even large island, and do so by the use of "boundary" lines attributing islands in accordance with which side of the line the islands lie on.

2.15 Malaysia challenges Indonesia's assertion that the initial British proposal was for a line running out from Broershoek through the channel between Sebatik and Nanoekan, and that such a line would inherently be a line running out to sea¹⁵. For the reasons given in paragraph 1.31 above, including in particular the maps used in the negotiations and to which attention is there drawn, Indonesia sees no reason to depart from the position it has adopted. As will be shown below (paragraph 2.27), Malaysia acknowledges¹⁶ that the Dutch Explanatory Memorandum Map showed the British proposal (i.e. the line coloured green) as a line extending out to sea.

2.16 Malaysia dissents from Indonesia's assertion that the use in Article IV of the term "along" (i.e. "along that parallel") confirms that a line of indeterminate length was intended¹⁷. Malaysia's response, that the sentence continues with the words "across the island of Sebatik" does not advance the argument in any way. If by those additional words Malaysia seeks to show that the island of Sebatik constitutes the terminal point for the line, then once again

¹³ See also ICM, para. 5.38.

¹⁴ MCM, paras. 2.47(d) and 2.66.

¹⁵ *Ibid.*, para. 2.47(e).

¹⁶ *Ibid.*, para. 2.55.

¹⁷ *Ibid.*, para. 2.47(f).

Malaysia is substituting self-serving assertion for argument. That the line continues "along" the 4°10' N line is clear; that it continues "across the island of Sebatik" is equally clear; that it stops there, as Malaysia contends, is not clear, and no amount of mere assertion by Malaysia will make it so.

2.17 Malaysia seeks to dismiss Indonesia's grammatical analysis of Article IV as "pure fiction", and as a "convoluted grammatical hypothesis", and claims that Indonesia is attempting to strike out the reference to the island of Sebatik¹⁸. As to that latter point, it is patently absurd: nowhere does Indonesia suggest that the reference to Sebatik should be treated as if it were not there: on the contrary, Indonesia expressly stated that it did play a role, "as a subsidiary description, for purposes of clarification", and recognised its consequences in paragraphs 5.43(i) and (j) of its Memorial. Malaysia may disagree with Indonesia's interpretation of the text in relation to the mention of Sebatik, which in Indonesia's view follows clearly from the structure of the sentence. If Malaysia disagrees with Indonesia's analysis of the terms of the Convention, Malaysia should not only say so (as it has, at least by implication) but should say why it does so. Unfortunately for Malaysia, grammar is essential to the attribution of meaning to language. Impatient dismissal of an inconvenient argument inspires no confidence in the merits of that dismissal. In the absence of any argument offered by Malaysia, Indonesia sees no reason to reconsider its grammatical analysis of Article IV, which supports Indonesia's view that the main clause of the Article is indisputably that the line "continues eastward along that parallel".

2.18 Astonishingly, Malaysia itself goes on immediately to invoke the grammatical significance of a semi-colon (actually a colon) in seeking to refute the meaning attributed by Indonesia to the word "across"¹⁹. Instead of following Malaysia in impatiently dismissing such a grammatical argument, Indonesia points out that:

- (a) Malaysia's view of the meaning of the word "across" is at odds with Indonesia's view, as to which see not only paragraph 5.43(h) of Indonesia's Memorial but also now paragraphs 5.22-5.23 of its Counter-Memorial; and

¹⁸ *Ibid.*, para. 2.47(g).

¹⁹ *Ibid.*, para. 2.47(h).

- (b) Malaysia's assertion that Indonesia was simply striking out the words after the colon, and its argument about the significance of the colon, are fully dealt with in Indonesia's Counter-Memorial, at paragraphs 5.24-5.25.

2.19 Malaysia seeks to deny that the principal thrust of Article IV is that the 4° 10' N line "continues eastward along that parallel", and calls such a view "imaginary"²⁰. Yet again, Malaysia, in the absence of good arguments, resorts to impatient dismissal. The reason why the principal thrust of Article IV is as Indonesia says it is, is simply that that *is*, as a matter of elementary grammar, the main clause of the sentence. Indonesia notes that Malaysia accepts that the "clarification says what it says, i.e. that the boundary crosses the island of Sebatik, dividing it in two": Indonesia agrees (particularly with Malaysia's acceptance of the reference to Sebatik as merely a "clarification"), but must add that that says nothing about the matter at issue, namely whether the line stops at the point at which 4°10' N crosses the east coast of Sebatik or whether, as the main clause of the Article says, it "continues eastward along that parallel".

2.20 Malaysia purports to misunderstand Indonesia's assertion that, apart from the attribution of islands to one Party or the other, there was no contemporary reason that the 4°10' N line should have extended out to the high seas²¹. Indonesia did *not* say, as Malaysia suggests, that there was no reason to extend the line out to the high seas: Indonesia said that there was no reason to do so "*other than the attribution of islands to one Party or the other*". Malaysia is wrong in saying that there were no disputed islands to allocate: Indonesia has shown, in its Memorial and also in its Counter-Memorial, that there was uncertainty about the maritime extent of territorial claims in the region, and that those claims – however insubstantial one side or the other might have considered them to be – which might have been the source of future discord, were put to rest by the 1891 Convention. Contrary to Malaysia's assertion, that is why under the 1891 Convention the 4°10' N line *did not* stop at the east coast of Sebatik but, as Article IV stipulated, "continued eastward along that parallel".

²⁰ *Ibid.*, para. 2.47(j).

²¹ *Ibid.*, para. 2.47(k).

2.21 Malaysia makes a wholly irrelevant riposte to Indonesia's statement that the continuation out to sea of the Convention line was consistent with the location of other Dutch possessions to the east, south of the Philippines²². Malaysia points out that the issue was not a neat delimitation of Dutch and Spanish possessions, but was rather the fixing of an Anglo-Dutch boundary in north-east Borneo. That is true – but does not in any way undermine the assertion, which remains correct and uncontradicted by Malaysia, that that Anglo-Dutch Borneo settlement was consistent with the location of other Dutch possessions in the area.

2.22 Malaysia's attempt to discount Indonesia's argument that the parties' concerns did not stop at the eastern limit of Sebatik but continued eastward into navigationally significant waters out to sea lacks all substance²³. The scope of the joint naval survey in May and June 1891, and its significance, has been discussed at paragraphs 1.35-1.44 above. That the survey stayed close to Sebatik was the result of the limited instructions given to the survey vessels, and had no implications for the meaning of the later Article IV of the Convention: their survey was not carried out in pursuance of any provision in the Convention, and was carried out *before* (and on the basis of instructions given *well before*) agreement was reached on the 4°10' N line and text of the Convention was adopted.

2.23 Malaysia's reliance on a *dictum* of the Tribunal in the *Guinea-Guinea Bissau* case²⁴ is misplaced. The issue before the Tribunal arose out of the terms of Article I of the Franco-Portuguese Convention of 1886²⁵, and concerned the question whether those terms established a maritime boundary between the parties' possessions. The Tribunal answered that question in the negative. In doing so it noted:

"that there was no question of territorial waters, either in the other negotiation protocols or in the official dispatches, notes or documents immediately prior to *or following* these negotiations, with the single exception of the internal note of the French Ministry of Foreign Affairs mentioned in paragraph 61 above²⁶". Thus an essential condition required to determine a maritime boundary did not exist"²⁷.

²² *Ibid.*, para. 2.47(l).

²³ *Ibid.*, para. 2.47(m).

²⁴ *Ibid.*, para. 2.48.

²⁵ See above, para. 1.33, in particular sub-para. (b) for a summary of the effect of Article I.

²⁶ See above, para. 1.33(a).

²⁷ *Guinea-Guinea (Bissau) Maritime Delimitation Case* (1985), ILR 77, p. 636 at p. 673, para. 79. Emphasis added.

It was in that context that the Tribunal went on to observe that:

"In the absence of any textual evidence, there is every reason to presume that the negotiators never envisaged anything but the land boundaries"²⁸.

This situation was very different from that of the 1891 Anglo-Dutch Convention. Not only were the issues quite different (maritime boundaries, not territorial sovereignty) but in relation to the 1891 Convention there was documentary evidence, both before, in, and after the conclusion of the Convention, showing that the negotiators intended that the line which they were laying down should continue eastwards out to sea along the 4°10' N parallel of latitude.

2.24 As to Malaysia's final point in paragraph 2.48 of its Counter-Memorial that, especially in 1891, a "boundary" could in no way be drawn in the open sea beyond territorial waters, Malaysia appears to have forgotten:

- (a) that in the area in question the line was a line dividing possessions of the two Parties, and was, at sea, a line of attribution;
- (b) that the use of the term "boundary" is not uncommonly used in relation to such maritime lines of attribution (and was so used in the Anglo-U.S. Convention of 1930²⁹, and in Article I of the Franco-Portuguese Convention of 1886 which was the subject of the *Guinea-Guinea Bissau* arbitration³⁰).

Section 2. The Explanatory Memorandum Map

2.25 As explained in paragraphs 5.44-5.45 of Indonesia's Memorial, and paragraphs 5.82 and 5.94 of its Counter-Memorial, The Netherlands ratified the 1891 Convention. This was expressly provided for in Article VIII of the Convention. As part of that ratification process, the Netherlands Government formally submitted to its Parliament a Map illustrating the

²⁸ *Ibid.*

²⁹ See further ICM, paras. 5.8 and 5.12.

³⁰ See above, para. 1.33(d).

outcome of the Convention³¹. That Map showed in red the line agreed in the Convention extending out to sea eastwards of Sebatik: the legend described that red line as the "line set out in Convention". The British Government knew of and acquiesced in that Map.

2.26 Malaysia deals with these matters in its Counter-Memorial principally at paragraphs 2.49-2.59, and in passing in several places but in particular at paragraph 5.8.

2.27 At paragraph 2.55 of its Counter-Memorial Malaysia poses a number of questions, intended to show that there was no rhyme or reason in the depiction of the agreed line as continuing out to sea for some 50 miles. Malaysia no doubt intended its questions to be merely rhetorical. But in fact all are capable of straightforward answers, which show that there was reason (if not rhyme) in the depictions on the Explanatory Memorandum Map.

- (a) There was no discrepancy between the Convention and the Explanatory Memorandum Map, as implied by Malaysia: Article IV provided for the line to be "continued eastward", and the Map showed just that - it illustrates with abundant clarity exactly what was intended by the terms of Article IV.
- (b) Malaysia goes on to ask why the red line (i.e., the agreed Convention line) ran out to sea: as just noted, it did so because such a 'continuation eastwards' was what Article IV required.
- (c) Malaysia professes to find it odd that the green line (i.e., the British proposal) ran out to sea: but it did so because that was exactly what the British proposal envisaged³².
- (d) Malaysia asks why the red line lengthened between its first draft on 23 June and the final version submitted with the Explanatory Memorandum on 25 July 1891: first because it is in the nature of drafts that they are subject to change, and second (if one is looking for a possible reason for this particular change) it could lie in the wish to show more clearly the effect of Article IV – the first

³¹ See Map No. 5 in the Map Atlas submitted with Indonesia's Memorial.

³² See above, paras. 1.31 and 2.15.

draft showed unmistakably that the line continued eastwards out to sea, but an even clearer depiction of that result was shown in the final version (perhaps inspired by the eastward extent of the British proposal – see above, paragraph 1.31 – which went approximately the same distance out to sea). It thus shows an intentional rendering of what Article IV provided, rather than some accidental carelessness.

- (e) And finally, why was the line not continued out until it met the Spanish possessions? - because the purpose of the Convention, and the line agreed in it, was nothing to do with the delimitation of Dutch-Spanish interests: as Malaysia itself put it, "The 1891 Boundary Convention was not concluded with Spain, but with Great Britain. The issue was not a neat delimitation of the Dutch and Spanish possessions [...]"³³.

Far from there being, as Malaysia puts it, "no logic to all this", there is in fact abundant logic, and the whole picture fits together extremely well in the manner suggested by Indonesia.

2.28 In paragraph 2.56 Malaysia professes to see in the Netherlands Government's reply to a question put to it, and in particular the absence of any mention in that reply of the Map in relation to the continuation of the line out to sea, some sort of acknowledgement that the Convention did not provide for a line going out to sea. Several points are called for in response to this argument:

- (a) The Government's reply was related to the question put to it: it was asked to give a particular declaration, and it did so. It is quite usual for Governments, in such circumstances, not to volunteer answers going beyond the question put.
- (b) The Government's reference to "all that lies to the south of the border (as defined in the agreement)" includes, of course, Article IV, and the 'continuation eastwards' of the agreed line *was* "defined in the agreement".

³³ MCM, para. 2.47(l).

- (c) The reference in the question, and in the reply, to possessions "in the island of Borneo" does not exclude off-shore islands where, as here, the text of the Convention was apt to cover them: see paragraph 5.14(e) of Indonesia's Counter-Memorial.
- (d) The Government had no need to refer specifically to the Map: it was before Parliament, and Members of Parliament were to be taken to be familiar with documents placed in front of them.

2.29 Malaysia, in a different part of its Counter-Memorial, criticises the accuracy of the Map, and in particular its omission to show Sipadan or to name Ligitan³⁴. In doing so Malaysia misses the point. First, many islands and similar features were not shown or identified on the Map: thus, a comparison between the Map (see Map No. 5 (Enlargement) in the Indonesian Map Atlas) and Map No. 23 (Enlargement) in the same Atlas shows that the former gives a very simplified representation of maritime features and in particular does not, for example, indicate P. Kapalai, Ligitan Reefs, Friedrich Reef, Roach Reefs, Alert Patches, P. Kumpang, Heel Reef, or Hand Rock, all of which are shown and named on Map No. 23 (Enlargement). But second, and more importantly, so long as the Map correctly shows the agreed 4°10' N line which separates Dutch and British possessions in the area (which it does), the attribution of small islands - and both sides agree that the two islands now in issue, as well as many on the northern (i.e., British) side of the line, *are* very small - follows automatically from their location in relation to that agreed line, and is not dependent upon their visibility on a map.

2.30 Malaysia's attempt, at paragraph 2.58 of its Counter-Memorial, to avoid the consequences of the British Government's actual knowledge of the Map and its failure to react against it in any way (it reacted *in favour of* it by putting it in its official archives) is singularly unconvincing. Malaysia does not deny that the Map was a matter of public knowledge for those concerned; Malaysia cannot deny that the British Government was among "those concerned"; Malaysia accepts that the British Minister in The Hague called the attention of Lord Salisbury to the Map - and it is to be noted that Sir Horace Rumbold's Despatch

³⁴ MCM, para. 5.8.

expressly described it as a map "showing the boundary-line *as agreed upon under the late Convention*" and drew specific attention to the Map as "the only interesting feature"³⁵.

2.31 There can therefore be absolutely no question but that the British Government, at the highest levels, was aware of the Map, and thus of all the lines on it, including the red line showing - as the legend on the Map clearly stated - what had been agreed in the Convention. The British Minister in The Hague had no need to single out for attention the line running out to sea: it will have come as no surprise to him since, as he put it in his Despatch, it was the map showing the boundary-line "as agreed in the Convention". Similarly, the fact that neither Lord Salisbury, nor Sir Edward Hertslet who had been one of the chief British negotiators, reacted against the Map shows that there was nothing in it to cause them concern as being inconsistent with the Convention. The internal Foreign Office receipt slip for Sir Horace Rumbold's despatch affords clear evidence that the despatch was received in the Foreign Office³⁶, that copies of the Map were with it, that it was marked to Sir Edward Hertslet to see, and that, by virtue of the tick against his name and his initials below it, he did in fact see it. It is pure speculation, backed by no evidence whatsoever, to suggest that the British would "probably" have been more interested in the land boundary as traced across the island of Borneo and the comparison between the four proposals: but even if this speculation is taken as correct, it would at the same level of speculation be scarcely imaginable that senior officials familiar with the course and outcome of the negotiations would have looked with interest at the land-related parts of the lines and then simply not noticed that one of them – the crucial line depicting what was agreed – continued out to sea.

2.32 In short, the British Government knew of the Map and had a copy in their possession contemporaneously with the Dutch ratification process and well before instruments of ratification were exchanged on 22 May 1892; and the British Government failed in any way to object to its depiction of the line agreed in the Convention. The British Government acquiesced in that Map – correctly so, for it simply depicted the line 'continuing eastwards' as stipulated in the Convention: to use the language in which Sir Horace Rumbold reported the

³⁵ IM, Vol. 3, Annex 81. Emphasis added.

³⁶ A copy is at Annex 3.

Map back to Lord Salisbury, it was the Map "showing the boundary-line as agreed upon under the late Convention"³⁷.

2.33 Contrary, therefore, to what Malaysia says³⁸, the British Government did accept the Map as an instrument related to the treaty. Its acquiescence in the Map involves its acceptance of it; and the British Government knew that it had been prepared in connection with the conclusion (i.e., ratification) of the treaty and depicted the line agreed in it – i.e., it was demonstrably an instrument related to the treaty, as required by Article 31.2(b) of the Vienna Convention.

2.34 Malaysia's attempt to distinguish the *Livre Jaune* map in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case is unconvincing³⁹. To argue, as does Malaysia, that in that case (but, by implication, not in the present case) the relevant treaty text was not free from ambiguities and made different interpretations possible, is to fly in the face of reality. The whole issue in this case, as the pleadings have amply demonstrated, shows that different interpretations of Article IV are being put forward by the two Parties, and the Explanatory Memorandum Map – like the *Livre Jaune* map – shows the line agreed in the Convention and acquiesced in by the other Party as a correct delineation of the agreed line.

2.35 For Malaysia to go on to argue that the parties, far from agreeing to the Explanatory Memorandum Map, agreed to a different map in 1915 is wilfully to confuse a Map drawn by one Party and acquiesced in by the other, depicting the line agreed in the 1891 Convention, with a map limited to illustrating only the small portion of the boundary which was the subject of the 1915 Agreement (see further, paragraph 2.47 below). In no way can the very limited 1915 map be compared with, let alone prevail over, the Explanatory Memorandum Map, except in respect of the limited stretch of boundary dealt with in the 1915 Agreement: the 1915 map is wholly irrelevant to any other stretches of the boundary, whether to the west or to the east of the limited stretch to which it referred.

³⁷ IM, Vol. 3, Annex 81.

³⁸ MCM, para. 2.63.

³⁹ *Ibid.*, para. 2.64.

2.36 As to Malaysia's cursory dismissal of the significance of the Court's statements in the *Temple* case, it too lacks conviction⁴⁰. It cannot be said, as Malaysia does in relation to the circumstances surrounding the Explanatory Memorandum Map, that the "circumstances did not call for any particular reaction". Where a State which has just concluded an important boundary treaty, and is made aware through official channels and as a matter of public knowledge, that the other Party is, in an official and public document, maintaining a particular view of the meaning of the treaty, it stays silent at its peril. The fact, so far as it may be true, that nobody mentioned the Map in the debates in the Netherlands Parliament or drew attention to the line's continuation out to sea, is no justification for the directly concerned other Party not to look carefully at what is put before it: there was nothing reticent about the depiction of the (agreed) red line on the Map, and its existence and purport were manifest at even the quickest glance – the Map's legend expressly described the red line as the "line set out in Convention". If the Party disagrees it must say so, and if it does not say so, it will be taken to have acquiesced. In this instance, Great Britain's acquiescence is not only evident as a matter of law, but is readily understandable as a matter of fact, since the depiction of the red line conformed to what Article IV said and will have come as no surprise to the British Government.

Section 3. The Irrelevance of the 1915 and 1928 Agreements

2.37 In its Memorial⁴¹ and Counter-Memorial⁴² Indonesia submitted that the agreements concluded in 1915 and 1928 were irrelevant to the application of the 1891 Convention to the islands of Sipadan and Ligitan. Although Article V of the Convention envisaged that the boundary described in the Convention would need further elaboration in detail, and that the 1915 and 1928 agreements were concluded pursuant to that provision in relation to certain limited parts of the agreed line, the seaward extension of that line did not call for any further precision since it was determined by reference to a parallel of latitude, and circumstances at sea did not allow for any specific demarcation.

⁴⁰ *Ibid.*, para. 2.65.

⁴¹ See IM, para. 5.65.

⁴² See ICM, paras. 5.97-5.118.

2.38 Malaysia, on the other hand, places great store by the conclusion of the 1915 Agreement, and the map attached to it⁴³. Malaysia's belief in the significance of this Agreement and map is misplaced.

2.39 Indonesia agrees with Malaysia that Article 31(3)(a) of the Vienna Convention requires that "any subsequent agreement between the parties [to a treaty] regarding the interpretation of the treaty or the application of its provisions" has to be ("shall be") taken into account, together with the context of the treaty.

2.40 The significance of this provision must be properly understood. Article 31 lays down the general rule of interpretation of treaties. Paragraph 1 requires (so far as here relevant) that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context [...]". Paragraph 2 stipulates what is to be regarded as the context of a treaty for the purpose of its interpretation. Paragraph 3 then requires that any subsequent agreements of the kind referred to are to be "taken into account, together with the context".

2.41 Two points about paragraph 3 should be mentioned. The subsequent agreements are only to be "taken into account": they are not necessarily decisive. And in particular there is nothing in Article 31 which suggests that a treaty delimiting in detail a small part of a boundary already delimited in general terms in some way governs the delimitation of the rest of the boundary. In so far as a subsequent agreement is to be taken into account, it is only for the purpose of serving, alongside the context of the original treaty, as a relevant consideration in establishing the ordinary meaning of that treaty's terms – for that is the only purpose under Article 31 for which the context of a treaty is relevant.

A. The 1915 Agreement

2.42 The 1915 Agreement was an agreement between the parties to the 1891 Convention in application of its provisions. In particular, it was concluded in application of Article V of the 1891 Convention. That Article provides:

⁴³ MCM, paras. 2.67-2.78, 2.79(f).

"The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherlands and British Governments may think fit".

In effect, therefore, the parties agreed in 1891 that there would be a later demarcation on the ground of the boundary delimited in the 1891 Convention.

2.43 An occasion for such a demarcation arose in 1910. The circumstances were recounted in Indonesia's Counter-Memorial, at paragraph 5.104, *et seq.* It is apparent from paragraph 4 of the letter of 11 March 1913 to the BNBC from the Governor of British North Borneo reporting the completion of the work of the demarcation commission that the demarcation owed much to uncertainties about the proper limits of tax collectors' activities⁴⁴. The internal report of 24 February 1913 submitted by the two British Commissioners⁴⁵ when formally submitting to their authorities the Joint Report of the British-Netherlands Commissioners of 17 February 1913⁴⁶ sets out in paragraphs 4 and 6 respectively the terms of the Commission given to the British Commissioners and of the instructions given to the Dutch Commissioners: these instruments add nothing of significance to the purpose of the Commissioners' work, other than that they were instructed to demarcate the boundary to the extent necessary.

2.44 The result was a boundary demarcation carried out on the spot by representatives of the two Governments. They started their work on the east coast of Sebatik, and worked their way westwards into the mainland of Borneo - but by no means the whole way along the mainland Anglo-Dutch boundary. In fact, as the sketch map at Annex 26 of Indonesia's Counter-Memorial shows, the demarcation only went a relatively short distance into mainland Borneo, covering only approximately 20% of the mainland boundary.

2.45 Malaysia attaches significance to the fact that the Commissioners started their demarcation work at the point on the east coast of Sebatik where it is crossed by the 4°10' N line of latitude. Malaysia seeks to draw from this the conclusion that the line prescribed by the 1891 Convention did not extend further east than the coast of Sebatik.

⁴⁴ Annex 11.

⁴⁵ Annex 10.

⁴⁶ ICM, Vol. 2, Annex 25.

2.46 Such a conclusion is wholly unjustified.

- (a) The task of the Commissioners was to "demarcate" the boundary. Demarcation at sea is neither possible nor necessary⁴⁷.
- (b) The task of the Commissioners was to demarcate the "boundary". In the absence of any islands east of Sebatik which the 4°10' N line crossed, there was no "boundary" to demarcate.
- (c) The fact that the Commissioners' *work* started at the east coast of Sebatik does not mean that the *Convention line* started there (any more than the fact that the Commissioners' work ended only some 20% along the boundary meant that the boundary ended there). It is in fact noteworthy that paragraph 3(1) of the Commissioners' Report does not say (as Malaysia's Counter-Memorial suggests, at paragraph 2.74; also 2.78(a)) that the boundary starts on the east coast of Sebatik. The Report actually says only:

"(1) Traversing the island of Sibetik, the frontier line follows the parallel of 4°10' north latitude [...]"⁴⁸.

This is perfectly consistent with the Convention line having begun further east and then, when it reaches Sebatik from the east, continuing across that island. It is only Malaysia which seeks to interpret the word "Traversing" as meaning "starting" – which it manifestly does not – indeed, if anything the word "traversing" suggests not that the line started at the first point mentioned but that it was already in existence out to the eastwards and then, upon reaching the island of Sebatik, crossed that island along the stated parallel of latitude.

⁴⁷ ICM, paras. 5.112 and 5.117.

⁴⁸ MM, Vol. 2, Annex 25, p. 96.

- (d) The fact that the Commissioners' Report refers to the interpretation of Article 2 of the Treaty mutually accepted by the Netherlands and British Governments in 1905 does *not*, contrary to what is said by Malaysia, "implicitly, but decisively, exclude any other mutually accepted agreement in the vicinity"⁴⁹.
- (i) Given that the Commissioners' task was to demarcate the boundary, it was entirely natural for them to identify their task by reference not only to the terms of the original treaty (the 1891 Convention) but also to the terms of a subsequent agreed interpretation of those terms.
- (ii) The implicit parallel between the 1905 agreed interpretation and some "other mutually accepted agreement in the vicinity" is fallacious, if by such "other" agreement Malaysia means an agreement about the seaward extension of the 4°10' N line. That seaward extension was not the result of some "other" agreement, but was an integral part of the 1891 Convention itself.
- (iii) Since the task of the Commissioners was to demarcate the boundary, which could not be done on the open sea, there was no reason whatsoever for The Netherlands to mention the fact that the 1891 Convention embodied an agreement that the line it prescribed continued out to sea. Such seaward continuation of the line was irrelevant to the purpose of the Commissioners' task.

2.47 The map attached to the Commissioners' Report does not have the significance given to it by Malaysia at paragraphs 2.75, 2.76 and 2.78(b) of its Counter-Memorial. That map appears to have accompanied the Commissioners' Report: it is so referred to in the preamble to the 1915 Agreement (although the Report itself makes no reference to the map) and the two Governments confirmed it. But it does not purport to be a map of the whole length of the

⁴⁹

MCM, para. 2.74.

1891 Convention line: it is merely a map of that part of the line demarcated on the spot by the Commissioners. Just as their work covered only a limited part of the boundary, so did their map. Its failure to include other parts of the Convention line, whether to the west or the east, implies absolutely nothing about such continuations of the Convention line, other than that those continued parts of the line were not dealt with by the work of the Commissioners.

B. The 1928 Convention

2.48 Malaysia's invocation of the 1928 Convention in this context is even more misplaced than its reliance on the 1915 Agreement. The conclusion of the 1928 Convention is said⁵⁰ to have been "another" opportunity for the Netherlands Government, if it had had second thoughts, to correct the 1915 map and agreement.

2.49 As explained, the conclusion of the 1915 Agreement was irrelevant to the continuation of the 1891 Convention line east of Sebatik. The conclusion of the 1928 Convention was even further removed from any relevance to that matter. As is vividly shown on the sketch map at Annex 26 of Indonesia's Counter-Memorial, the 1928 Convention dealt only with a tiny sector of the inland boundary on the mainland of Borneo, well over towards the western end of that boundary, i.e. almost at the opposite end of the boundary from Sebatik and the continuation of the Convention line eastwards beyond that island.

2.50 Not only was the subject matter of the 1928 Convention far removed from the area of any pretended Indonesian concern with the demarcation and map of 1913/1915, but in fact Indonesia has no problems with that demarcation and map. As respectively a demarcation of a particular section of the boundary, and as a map recording the extent of that demarcation, The Netherlands accepted them, as does Indonesia now: but they are simply irrelevant to the point at issue, namely whether the line prescribed by the 1891 Convention continued eastwards along the 4° 10' N parallel of latitude beyond the east coast of Sebatik. Thus, The Netherlands had no need to look for "another opportunity" to "correct" the 1915 Agreement and map.

⁵⁰

Ibid., para. 2.77.

Section 4. Internal Dutch Deliberations on a Maritime Boundary East of Sebatik

2.51 In Chapter 4 of its Counter-Memorial (paragraphs 4.10-4.18), Malaysia deals extensively with internal discussions within the Dutch administration during the years 1922-1926 concerning the desirability of raising the issue of the delimitation of the territorial sea off the east coast of the island of Sebatik with the British Government. Indonesia was of course fully aware of these discussions, but has not previously dealt with them simply because they are totally irrelevant. By raising this matter, Malaysia is confusing the question of delimitation of the territorial sea (which is not the subject of the present dispute) with the question of title to territory.

2.52 Contrary to what Malaysia seems to imply, Indonesia has never suggested that the 1891 Convention line was from the outset intended also to be, or in effect was, a maritime boundary in the sea area east of Sebatik island. Rather, as submitted by Indonesia in its Memorial⁵¹ and Counter-Memorial⁵², the line must be considered an allocation line: land areas, including islands located to the north of 4° 10' N latitude were henceforth considered to be British, and those lying to the south were Dutch. That such land territory and islands generate a territorial sea which may require delimitation is another matter.

2.53 At the time of the conclusion of the 1891 Convention and the internal Dutch discussions during the 1920's, the only maritime jurisdictional zone that was generated by sovereignty over land was the territorial sea, extending to a maximum breadth of three nautical miles measured from the baseline of the coastal State. In cases of adjacent coastal States, and of opposite coastal States where the distance between their respective coasts was less than six miles, a delimitation of the respective territorial seas would, in principle, be called for. This was the case in the area east of Sebatik Island, where, as a result of the 1891 Convention, the land boundary terminated on the eastern shore of the island and thus the question arose how exactly the territorial sea boundary east of that point should be drawn. In addition, depending upon the course of this boundary, the delimitation with the territorial sea of the opposite mainland (Batoe Tinagat) might have come into play since Cowie Bay is less than six miles wide.

⁵¹ See, for example, IM, paras. 5.67, 6.1 and 9.13.

⁵² See, for example, ICM, para. 5.10.

2.54 The internal Dutch discussions, as accurately described in Malaysia's Counter-Memorial, focused on the various options available in these particular circumstances. One option was to consider the 1891 Convention as also constituting offshore (i.e., up to three miles from the coast) a territorial sea boundary. The other option was to use the solution provided under the applicable rule of general international law – i.e., a line drawn perpendicular to the coast at the terminus of the land boundary⁵³. The internal Dutch discussions reveal that differing views were expressed by various government officials on the preferred option, but the final view expressed in September 1926 by the Minister of Foreign Affairs (who has the final authority in such matters) was that the perpendicular line should apply and that it was not opportune to raise the matter with the British Government. And so it was decided. The matter was never raised with the British by the Dutch Government.

2.55 According to Malaysia, the discussions during 1922-1926 show "that the Dutch colonial officers themselves did not at the time think a maritime boundary had been established by the 1891 Convention"⁵⁴. That conclusion is correct, and is entirely consistent with Indonesia's view that the 1891 Convention line, extending to the east of Sebatik Island, was an allocation line and *not* a maritime boundary. It should be stressed here again that any maritime boundary at the time could only have been a territorial sea boundary extending no more than three miles from the coast. But the 1891 line east of Sebatik had a different purpose. It represented a line separating territorial possessions, and because there were no insular possessions lying within three miles of the coast of Sebatik, the 1891 line (of attribution) was represented as a straight line along the 4° 10' N parallel of latitude. Consequently, there is nothing incompatible between the 1891 Convention line and the Dutch internal discussions as Malaysia tries in vain to imply.

2.56 It is also important to point out that the internal Dutch discussions of 1922-1926 were entirely restricted to the territorial sea boundary off Sebatik Island and did not involve the islands of Sipadan and Ligitan. This can easily be explained by the fact that in the cases of those two islands no territorial sea delimitation questions arose since they are located at distances of more than six miles from the nearest BNBC islands of Kapalai and Dinawan.

⁵³ See the maps at MCM, pp. 76 and 77.

⁵⁴ *Ibid.*, para. 4.10.

2.57 What is also of interest is the fact that when, in 1968, Malaysia granted an offshore oil prospecting license to the Japanese company, Teiseki, the limits of Teiseki's concession just off the east coast of Sebatik followed the same perpendicular line that had been discussed by the Dutch in the 1920s. This can be seen from examining Map 2 which appears facing page 60 of this Reply. Thereafter, as Indonesia has explained in its Memorial⁵⁵, the southern limits of the Teiseki concession tracked the 4° 10' N line of latitude leaving a 30" buffer zone between those limits and the 4° 10' N line just as Indonesia had done with its own concessions.

2.58 Finally, it should be noted that the authorities of the Netherlands East Indies have, subsequent to the 1920's discussions, on occasions treated the 1891 Convention line as also constituting a territorial sea delimitation. This can be concluded from a map published in 1939 which shows the territorial sea off the coast of the sub-division of Tarakan⁵⁶. The northern boundary of the territorial sea (with British North Borneo), east of Sebatik Island, follows the 1891 Convention line. This map is a so-called "Mining Legislation Map" (based on the Mining Act of the Netherlands East Indies), showing the areas reserved for mining and the concessions granted and applied for. The interesting aspect of this map is that it shows that, notwithstanding the 1920's internal discussions, the Dutch authorities during the 1930's had already begun to respect the line in practice (i.e., for the purpose of granting oil concessions). Indonesia will elaborate further on the significance of the treatment by both Parties of the 1891 Convention line in practice in the next chapter.

⁵⁵ IM, paras. 6.11-6.27.

⁵⁶ Annex 28 to this Reply.

Section 5. Conclusion

2.59 It is apparent, for the reasons set out in this and the preceding Chapters (in amplification of those already given in Chapter V of Indonesia's Memorial and Chapter V of its Counter-Memorial), that:

- (a) the parties' intention that the 4° 10' N line extended eastwards from Sebatik is substantiated by the Explanatory Memorandum Map, in which Great Britain acquiesced;
- (b) the 1915 and 1928 Agreements do not contradict this conclusion as to the effect of the 1891 Convention;
- (c) the internal Dutch territorial sea discussions are irrelevant as regards sovereignty over Sipadan and Ligitan.

2.60 Further, as will be shown in Chapter III, subsequent maps (starting with the Stanford map of 1894) specifically delineate a line at 4° 10' N, and such a line, which must have its roots *somewhere*, can only have been based on the 1891 Convention.

2.61 It follows that The Netherlands' (and now Indonesia's) sovereignty over Sipadan and Ligitan was acknowledged by the 1891 Convention, in particular its Article IV, which for the future rendered that title unchallengeable at least by Great Britain and its successors in title. Subsequent events have not displaced that treaty-based title.

CHAPTER III

THE SUBSEQUENT CONDUCT OF THE PARTIES **CONFIRMING INDONESIA'S TITLE TO THE ISLANDS**

3.1 In this Chapter, Indonesia will review the various elements of the conduct of the Parties and their colonial predecessors which confirms Indonesia's interpretation of the object and purpose of the 1891 Convention and hence Indonesia's title to Sipadan and Ligitan islands. Malaysia has preferred to give a very cursory treatment to these elements in its pleadings since they fundamentally contradict Malaysia's thesis of the case. But the evidence adduced by Indonesia cannot be so easily dismissed. The striking aspect of this conduct is that it reflects the *mutual* views of the Parties that the 4° 10' N line established by Article IV of the 1891 Convention extended to the east of the Island of Sebatik in conformity with the Dutch Explanatory Memorandum Map which was prepared in connection with the conclusion of the Convention.

Section 1. The Visit of the Dutch Naval Vessel, *Lynx*, to Sipadan and Ligitan in 1921

3.2 Throughout the early years of the 20th century, Dutch naval vessels were active in patrolling the areas east of Sebatik including around Sipadan and Ligitan. The Court will find a list of such voyages annexed to Indonesia's Counter-Memorial as well as a report of a visit of the HNLMS *Koetei* in September 1910 to the vicinity of Sipadan¹.

3.3 In November and December 1921, the HNLMS *Lynx*, a Dutch destroyer operating in tandem with a seaplane, made several visits to Sipadan and Ligitan in a clear display of Dutch sovereignty over both islands. The *Lynx's* mission was to patrol for pirates in territorial waters and insular possessions that belonged to The Netherlands. Throughout this voyage, which is discussed at paragraphs 6.3-6.5 of Indonesia's Memorial, the *Lynx* carefully avoided venturing within the three-mile territorial sea limit of British islands, such as Si Amil,

¹ ICM, Vol. 2, Annexes 32 and 33.

which lay north of the 4° 10' N line. Because Sipadan and Ligitan both lay to the south of that line, the *Lynx* and the seaplane did visit them. Moreover, the activities of the *Lynx* were immediately reported to British authorities who raised no objection.

3.4 In response to this important voyage, Malaysia's Counter-Memorial does no more than to assert, in a wholly self-serving fashion, that "as an incident it proves nothing" and that, "the *Lynx* incident certainly did not amount to a claim of sovereignty on Pulau Sipadan"².

3.5 Such an attempt at rebuttal is hardly convincing. The detailed report of the *Lynx*'s visit to the region prepared by its commanding officer clearly demonstrates that the captain of the *Lynx* considered both Sipadan and Ligitan to fall under Dutch sovereignty. This was in stark contrast to the island of Si Amil, which, because it lay north of the 4° 10' N line *was deemed to be British*. It is useful to recall some of the salient comments contained in the commander's report which bear this conclusion out. The report itself may be found in Annex 120 of Indonesia's Memorial.

3.6 The report contains the following highly relevant entries:

- (i) November 25, 1921: "HNLMS *Lynx* then weighed anchor at 18:00 hrs. and steamed away. After passing the lightship the lights were doused and we set sail for the island of Sipadan. We did not meet any proas during the night of 25 to 26 November and arrived at Sipadan at 0600 hrs. Sipadan lies approximately 20 miles from Si Amil. An armed sloop was sent ashore for information, but returned empty-handed".
- (ii) "The plane was launched at 1000 hrs. and took off easily. The plane flew via Sipadan to the 3-mile limit off Si Amil".
- (iii) "On Sunday, 27 November at 1830 hrs. I received your encoded wireless telegram sent on 25 November at 0940 hrs. which reads after decoding: 'With reference to your wireless telegram, English authorities will be warned without delay. Keep fleet under surveillance. As soon as they leave English territorial waters, seize them and take the Raja's prau to Tarakan for investigation of the incident responsible for *Lynx*'s presence' [...]"

² MCM, paras. 4.8-4.9.

- (iv) 28 November 1921: "Lynx left the roads of Tarakan to sail to Si Amil to try to catch Raja Panglina Djumang of Sulu outside British territorial waters".
- (v) "The plane made another flight to Si Amil that afternoon, where it discovered the pirate fleet of 40 proas under the leadership of Raja Panglina Djuwang. The plane landed outside the 3-mile limit".
- (vi) 30 November 1921: "Weighed anchor at 2330 hrs., and steamed to Sipadan where no proas were seen. Sailed from there on 1 December to the 3-mile limit on the east side of Si Amil, where we found 40 proas fishing on the reef. It is gradually becoming clear that they have formed a settlement on Si Amil. Steamed away from Si Amil again in a southerly direction and sailed from Ligitan to South Sibetik."
- (vii) "We launched the plane on 1 December at 0900 hrs., after which it made a tour to Ligitan heading to south Sibetik [...]"
- (viii) "The plane then flew on from Ahus to the east of Mandul and from there directly to the island of Sipadan and the nearby Si Amil, where the fleet of 40 proas were still fishing. Received a wireless telegram at 1100 hrs through Tarakan from the Resident of Bandjermasin as follows: 'Regarding your signal yesterday, if pirates outside our territory and no threat to settlements expected, no further measures from Lynx needed'".

3.7 These reports make it abundantly clear that Sipadan and Ligitan, together with their territorial waters, were considered to be under Dutch sovereignty. Si Amil was not so considered, and hence the *Lynx* and its seaplane were always careful not to approach closer than three miles from this island. The British authorities were made aware of the *Lynx*'s activities and never once protested or suggested that the *Lynx* was operating in British controlled areas. As such, the *Lynx* episode provides the clearest possible confirmation in physical terms – i.e., actual acts on the islands and within their territorial seas – that sovereignty over Sipadan and Ligitan vested with The Netherlands without any objection from Great Britain³.

³ Malaysia's attempt to distinguish the *Lynx* visit to the islands with that of the U.S. vessel, the *Quiros*, in 1903 is totally unavailing (MCM, para. 4.9). As will be seen in Chapter VI, below, the voyage of the *Quiros* to the region did not result in any U.S. claim of sovereignty over the islands. To the contrary, U.S. vessels were expressly instructed not to make any such claims; see IM, Vol. 3, Annexes 106, 107 and 108.

Section 2. The Oil Concession History Supports Indonesia's Title

3.8 In its previous pleadings⁴, Indonesia dealt fully with the fact that, in awarding oil concessions in the area prior to the emergence of the dispute in 1969, both Indonesia and Malaysia studiously respected the 4° 10' N parallel as representing the limit of their respective jurisdictions. The Teiseki concessions (awarded by Malaysia) and the JAPEX concession (awarded by Indonesia) have been plotted, in red and green respectively, on a nautical chart of the area which appears opposite as Map 2.

3.9 As Indonesia showed, the Parties' mutual respect for the 1891 Convention line (each side's concessions stop 30 seconds – approximately half a mile – short of the 4° 10' N parallel), is highly relevant⁵. Such mutual conduct brings to mind the practice of the parties in the *Tunisia/Libya* case where the existence of a *de facto* line separating the parties' respective offshore oil concessions constituted a highly relevant circumstance in the delimitation of their maritime boundary⁶. Although this case does not involve maritime delimitation, the Court's observation in the *Tunisia/Libya* case that, "it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such" is equally apposite in the present case⁷. In short, the Parties to this case respected the *precise line* established by the 1891 Convention in the granting of their offshore concessions. There is no other way to view the Parties' adoption of the 4° 10' N line for the limit of their petroleum activities than as a reflection of the 1891 Convention.

3.10 In its Counter-Memorial⁸, Malaysia quotes Article 2.1 of the JAPEX concession, in which "Contract Areas" are defined as "the continental shelves within the statutory mining

⁴ IM, paras. 6.10-6.29; ICM, paras. 7.56-7.57.

⁵ IM, para. 6.29.

⁶ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 at p. 84, paras. 117-118.

⁷ *Ibid.*, p. 84, para. 118. Moreover, it is the Parties' *mutual* respect for the 1891 line which distinguishes the present case from the *Eritrea/Yemen* case where no such mutual conduct existed.

⁸ MCM, para. 4.38.

territory of Indonesia[...]" and notes that Tarakan Island and Bunju Island are excluded from the Contract Area outlined in Exhibit A-2. However, Malaysia's fails to acknowledge that the preamble of the contract provides that Permina (a State enterprise) had "an exclusive 'Authority to Mine' for mineral oil and gas in and throughout the areas described in Exhibit A and B", and that although Tarakan and Bunju islands are excluded from the scope of Exhibit A (undoubtedly for contractual reasons), numerous other islands are not. Consequently, the contract clearly presupposed that the area described in Exhibit A fell within Indonesia's sovereignty.

3.11 In any event, since the concession area did not extend so far east as to encompass either of the islands in dispute, Malaysia's argument is irrelevant. What is important is that the northern boundary of the concession tracked the 4° 10' N parallel (albeit leaving a small 'buffer strip'). This practice reflected a clear understanding that the 1891 Convention line extended out to sea.

3.12 With regard to the Teiseki concessions, Malaysia is strikingly reticent in its Counter-Memorial. Malaysia simply notes that the Teiseki concessions did not include either of the islands in dispute (which is self-evident and fully supportive of Indonesia's case), and concludes that the concession is thus of "limited interest for these proceedings"⁹.

3.13 Nothing could be further from the truth. The coordinates of the Teiseki concessions are of great interest since they clearly reflect an understanding on the part of Malaysia that the 1891 Convention line extended offshore eastward of Sipadan and Ligitan, and that Malaysia respected this line in awarding its concessions. Malaysia has provided no other explanation for why its concessions so faithfully took into account the 1891 Convention line and why it failed to object to Indonesia's own concessions which followed the same line.

⁹ *Ibid.*, para. 4.41.

3.14 It is also astonishing that Malaysia passes over in silence the official map produced by the Malaysian Ministry of Lands and Mines in 1968 depicting the limits of Malaysia's offshore oil concessions in the relevant area and Malaysia's international boundaries¹⁰. For the convenience of the Court, this map is reproduced opposite as Map 3¹¹.

3.15 With respect to the map, Indonesia would recall the following:

- (i) The map was prepared by the Ministry of Lands and Mines of the Malaysian Government and thus represented the official view of the Malaysian Government as of 1968, one year before the dispute between the Parties arose;
- (ii) The map contains no disclaimer as to boundaries;
- (iii) Because petroleum operations are key issues for any government, the map must be viewed as reflecting the careful and considered views of the Malaysian Government on the question of concession limits and their implication for boundaries in the relevant area;
- (iv) The map clearly shows the southern limits of the 1968 Teiseki concession extending east of the Island of Sebatik along, or very close to, the 4° 10' N line of latitude. In fact, these limits lay along the 4° 10' 30" N line of latitude;
- (v) The map also specifically depicts "international boundaries", with the 4° 10' N line shown as such a boundary with Indonesia extending to a point well to the east of Sipadan and Ligitan;

¹⁰ At para. 5.21(g) of its Counter-Memorial, Malaysia states that this map is discussed at pp. 88-93 of the Malaysian Counter-Memorial. But the Court can search these pages of Malaysia's pleading in vain for any mention of this map. Quite simply, Malaysia has opted to ignore this key map which is so devastating to its case.

¹¹ The Court will also find this map facing page 106 of Indonesia's Memorial and attached as Annex 36 to Indonesia's Counter-Memorial.

- (vi) Similarly, the map shows that to the east the Teiseki concession followed the precise limits of the 1930 boundary agreed between Great Britain and the United States. It is thus clear that Malaysia's intention was to grant a concession to Teiseki up to the limits of its jurisdiction and possessions. As noted above, this was the 4° 10' N line in the south;
- (vii) There is no other explanation for the depiction of 4° 10' N line as Malaysia's "international boundary" on this official map other than the fact that the map reflected Malaysia's contemporaneous view that the boundary line separating each State's possessions did, as Indonesia has maintained, fall along the 4° 10' N parallel established by the 1891 Convention;
- (viii) It follows that Malaysia's assertion that "The 1891 Boundary Convention was wholly irrelevant, and remained so until it became the focus of the Indonesian claim in 1969"¹² is flatly contradicted by Malaysia's own conduct.

3.16 The practice of the Parties in awarding concessions which respected the 4° 10' N parallel represents "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". This practice, Indonesia respectfully submits, should be taken into account by the Court as a key element in the case in accordance with Article 31, paragraph 3 (b) of the 1969 Vienna Convention on the Law of Treaties.

3.17 In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*¹³ which Malaysia cites¹⁴, the Court stressed the importance of such "subsequent practice" with reference to the International Law Commission's commentary on the relevant article of the draft Convention. The Court stated:

¹² MCM, para. 3.3.

¹³ *Judgment*, 13 December 1999.

¹⁴ MCM, para. 4.48.

"The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals"¹⁵.

3.18 It is Indonesia's submission that the Parties' clear and consistent practice in awarding oil concessions reflected a common understanding that the 1891 Convention line extended eastwards, beyond Sipadan and Ligitan, and that consequently, in accordance with established jurisprudence, the Court should have recourse to it as an aid in its interpretation of the Convention¹⁶.

Section 3. Navigational Aids Erected by the Parties on Either Side of the 4° 10' N Line

3.19 This is another important element which Malaysia has ignored in its pleadings. Without repeating the facts set forth in Indonesia's Memorial relating to the navigational aids established by the Parties on their respective sides of the 4° 10' N line¹⁷, Indonesia would recall the following.

3.20 Lying to the west of Sipadan and Ligitan are two series of partially submerged reefs called Alert Patches and Roach Reefs. The location of these features may be identified on Map 2, facing page 60.

3.21 In 1994, Malaysia erected a series of navigational buoys on Roach Reefs located just to the north of the 4° 10' N line. That same year, Indonesia erected a light beacon and buoys

¹⁵ *Yearbook of the International Law Commission, 1966*, Vol. II, p. 241, para. 15, quoted in the Judgment in *Kasikili/Sedudu Island (Botswana/Namibia)*, *ibid.*, para. 49.

¹⁶ It was only on 3 October 2000 that Malaysia, for the first time, protested Indonesia's concessions in the area. It is significant that this protest, which came more than 30 years after Indonesia first granted concessions in the area, was only submitted after Indonesia had raised the concessions history in its Memorial. Indonesia responded to this protest by letter dated 21 November 2000. A copy of this correspondence may be found in Annex 23.

¹⁷ See IM, paras. 8.41-8.45.

on Alert Patches which are located just to the south of the 4° 10' N line at latitude 4° 09' 33" N¹⁸.

3.22 Malaysia was fully aware of Indonesia's activities in this regard but raised no protest. Indeed, an Indonesian naval report attached as Annex 181 to Indonesia's Memorial records the fact that three Malaysian naval vessels observed the Indonesian authorities set up the buoys but did nothing to interfere.

3.23 In carrying out these activities, it is clear that the Parties were scrupulous in their respect for the 4° 10' N line. Indonesia respected Malaysia's right to erect navigational aids north of the 4° 10' N line; Malaysia did the same with respect to Indonesia's activities south of that line.

3.24 This conduct, once again of a mutual nature, provides further confirmation as to how in practice the Parties interpreted Article IV of the 1891 Convention. Had the 4° 10' N parallel not been viewed as constituting an allocation line, these incidents would have given rise to protests. The fact that no protests were forthcoming is eloquent testimony to the agreed status of the 4° 10' N line as extending well to the east of the Island of Sebatik.

Section 4. Indonesian Naval Patrols and Fishing Activities

3.25 Indonesia's understanding that the 4° 10' N parallel represented the limit to its jurisdiction is confirmed by the activities of the Indonesian navy and of fishermen from the Kalimantan coast during the period from Indonesia's independence until 1969.

3.26 These activities were set out at paragraphs 6.6 to 6.9 of Indonesia's Memorial, and are supported by the affidavits attached to the Memorial as Annexes D, F, G and H (regarding the naval patrols) and Annexes I, J, K, L and M (regarding fishing activities).

¹⁸ For details, the Court is referred to IM, Vol. 4, Annexes 179 and 181.

3.27 As regards the affidavits concerning the Indonesian naval patrols, Malaysia can say nothing more than that such patrols were "quite an exceptional practice" and that they "seemed uneventful"¹⁹. As rebuttal, these comments are unsubstantiated and entirely inadequate. The fact, uncomfortable as it is for Malaysia, remains: the Indonesian navy did patrol the areas encompassing Sipadan and Ligitan after independence, and the patrols' "uneventful" nature (i.e., that they were not protested by Malaysia) merely supports Indonesia's entitlement to patrol in these areas.

3.28 Malaysia's comments regarding the traditional practice of Indonesian fishermen to fish around the islands of Sipadan and Ligitan, where they would take refuge should the need arise, are similarly brief and dismissive²⁰. The fact of the matter remains that fishermen from the Kalimantan coast have traditionally fished on and around the islands, a fact that Indonesia has supported with affidavit evidence and which Malaysia has failed to rebut. This thus constitutes further evidence that Indonesia considered itself as possessing sovereignty over the islands consistent with the terms of the 1891 Convention.

Section 5. The Map Evidence Supports Indonesia's Position as to Sovereignty

3.29 The Parties have presented a significant body of cartography in these proceedings and both have argued that the preponderance of the map evidence supports their respective positions²¹.

3.30 Despite the amount of cartographical evidence produced and relied upon by Malaysia, it is curious to note the defensive shift of position adopted in Malaysia's Counter-Memorial where Malaysia attempts to downplay the relevance of maps in the determination of boundary disputes²². Indonesia can only surmise that Malaysia realises that the maps, particularly the relevant British and Malaysian cartography, support Indonesia's case.

¹⁹ MCM, para. 4.46.

²⁰ *Ibid.*

²¹ See, for example, IM, paras. 6.77-6.79; ICM, para. 7.93 and Map Annex; MCM, paras. 5.37-5.39.

²² MCM, paras. 5.31-5.39.

3.31 In this section, Indonesia will review the cartographic evidence in the case which so clearly shows the existence of a line extending along the 4° 10' N parallel east of the Island of Sebatik, thus confirming that Great Britain and The Netherlands (subsequently, Malaysia and Indonesia) understood that the 4° 10' N line established by the 1891 Convention separated their respective possessions off the east coast of Borneo. Moreover, the record includes an impressive number of official maps – published both prior and subsequent to the emergence of the dispute in 1969 – which represent admissions against interest by Malaysia²³.

3.32 Malaysia's Counter-Memorial attempts to distinguish two categories of cartographical evidence: (a) maps annexed to boundary treaties or demarcation agreements; and (b) maps not agreed by the Parties, and which do not form part of internationally binding instruments relating to a boundary²⁴. Malaysia asserts that maps in the first category "are of great importance and may be decisive", while maps in the second category "are not to be treated in any way as if they were documents of title"²⁵.

3.33 While it is undisputed that the probative value of maps in boundary disputes varies depending on a number of factors, Indonesia submits that the classification adopted by Malaysia is overly simplistic and fails to take into account the fact that maps produced in connection with the conclusion of a boundary treaty – the 1891 Dutch Explanatory Memorandum Map being a prime example – can be "decisive". Moreover, Malaysia also fails to acknowledge that other maps produced by one of the Parties, or its colonial predecessor, which show a boundary inconsistent with the position now espoused by that Party can also be highly relevant.

3.34 An objective appraisal of the cartographic evidence which is relevant in the present dispute leads to the identification of a number of important maps which can be distinguished as follows:

²³ In Section 3C of Chapter VII and in the Map Annex attached to this Reply, Indonesia will analyse the maps submitted by Malaysia with its Counter-Memorial.

²⁴ MCM, para. 5.32.

²⁵ *Ibid.*

- (i) maps which represent the parties' intentions with regard to the boundary line expressed during the course of the negotiations leading up to the conclusion of the 1891 Convention;
- (ii) maps reflecting the contemporaneous view of the parties' interpretation of the terms of the Convention and its implications;
- (iii) maps which confirm the parties' interpretation of the line resulting from the Convention in the years following its conclusion²⁶; and
- (iv) maps which can be viewed as admissions against interest, i.e., which "do not assert the sovereignty of the country which the Government has caused them to be issued"²⁷.

3.35 Maps falling within the first category have already been addressed by Indonesia in Chapter I. Indonesia has shown that a number of such maps were produced and exchanged by the signatories to the Convention. These maps show that The Netherlands and Great Britain both intended the boundary line to extend out to sea beyond the east coast of the Island of Sebatik²⁸.

3.36 With respect to maps constituting the contemporaneous view of the parties as to the object and intent of the 1891 Convention, Indonesia has shown that the Dutch Explanatory Memorandum Map is particularly relevant. Suffice it to recall that the map was presented to the Dutch Parliament in connection with The Netherlands' ratification of the Convention and it was available to, and examined at the highest levels of, the British Government. Indeed, it was Sir Horace Rumbold who, even before instruments of ratification were exchanged, described the map to the Foreign Office as "showing the boundary line as agreed upon under

²⁶ See IM, para. 6.36.

²⁷ *Island of Palmas*, 2 *R.I.A.A.* (4 April 1928), p. 829 at p. 852.

²⁸ See paras. 1.30-1.31, above; see also ICM, paras. 5.70-5.75.

the late Convention"²⁹. The map so described drew no protest or dissent from the British Government.

3.37 In Indonesia's submission, the Explanatory Memorandum Map – seen also in the context of the proposals exchanged between the parties prior to the conclusion of the 1891 Convention – must be regarded as a mutually agreed depiction of the terms of the treaty.

3.38 As for the third category of maps, both Indonesia and Malaysia have submitted an extensive selection of official maps published after the 1891 Convention was concluded which show the international boundary extending across Sebatik Island and then continuing seawards along the 4° 10' N parallel³⁰. Of particular significance is the fact that a large number of British (particularly those prepared by Stanford for the BNBC) and Malaysian maps depict the 4° 10' N line in this manner. The only possible conclusion is that these maps reflected the parties' views as to the impact of the 1891 Convention, including the fact that the boundary line did not stop at the east coast of the Island of Sebatik as Malaysia contends. Malaysia has provided no alternative explanation for why its own maps, and those of Stanford, repeatedly depicted the 4° 10' N line in this manner if its own interpretation of the Convention is correct.

3.39 Maps published following the conclusion of the 1891 Convention reflecting such official intent include, in the period immediately following the signature of the Convention, the following:

- (i) Stanford's map of Borneo dated 1894.
- (ii) Stanford's map of Borneo dated 1903.
- (iii) Stanford's map of Borneo dated 1904.

²⁹ See paras. 2.30-2.31, above.

³⁰ Indonesia would also draw the Court's attention to a commercially produced Dutch map prepared in 1894, shortly after the conclusion of the 1891 Convention, which likewise shows the 4° 10' N Convention line continuing eastwards from Sebatik. A copy is at Annex 27.

3.40 The 1903 Stanford map was included in Indonesia's Memorial facing page 118. The other two maps (as well as an 1887 Stanford's map) have been inserted in the following Chapter where they are discussed in more detail. Their relevance for purposes of this case rests on the following:

- The 1887 map, which pre-dated the 1891 Convention, does not show any boundary line extending out to sea from the Borneo mainland. This reflected the fact that there was no agreed boundary at that time.
- Subsequent Stanford's maps issued after the Convention entered into force consistently show the southern limit of the BNBC's provinces as lying along the 4° 10' N parallel of latitude extending out to sea from the Island of Sebatik.
- This line did not just appear out of nothing. The only possible explanation for its appearance on the maps is that it reflected Stanford's understanding – and hence the BNBC's understanding as well since Stanford acted as the BNBC's official cartographer – of the terms and effect of the 1891 Convention.
- Islands lying south of the 4° 10' N line depicted on the map must have been deemed to be Dutch. The line arose as a result of the 1891 Convention between The Netherlands and Great Britain. The United States, as will be seen in Chapter VI, had no interests to the south of the line. In fact, the Stanford maps all show the limit of U.S. possessions in the area as lying in the vicinity of Sibutu Island which is well to the northeast of the 4° 10' N line.

3.41 The same 4° 10' N line appears with regularity on Malaysia's own maps of the area. While some of these maps contain a disclaimer as to the boundaries depicted, others do not. What is significant is the repeated appearance of the line on the maps. Once again, there is no explanation for the line other than the fact that it reflected the 1891 Convention. In this respect, the following maps merit particular attention.

- (i) *Pulau Sebatik*, Ministry of Defence of the United Kingdom (for the Directorate of National Mapping, Malaysia), 1964³¹. Malaysia still has not explained why the boundary line extends due east of the Island of Sebatik along the 4° 10' N parallel if not based on the 1891 Convention.
- (ii) *Tawau*, Ministry of Defence of the United Kingdom (for the Directorate of National Mapping, Malaysia), 1965³². The map again clearly depicts the 4° 10' N boundary extending out to sea.
- (iii) *Malaysia, Singapura, Brunei: Pemerintah* (Political map of Malaysia Singapore & Brunei), Directorate of National Mapping of Malaysia, 1966³³. The boundary, as to which there is no disclaimer, clearly follows the 4° 10' N parallel.
- (iv) *Malaysia Timor Sabah*, Malaysian Department of Land and Surveys, Sabah, 1964, printed by the Malaysian Directorate of National Mapping, 1966³⁴. While the map contains a gap in the 4° 10' N line, it also shows that line extending east of Sebatik. Malaysia has failed to explain why the 4° 10' N line was extended so far out to sea if not in accordance with the 1891 Convention.
- (v) *Malaysia Timor Sabah*, Malaysian Department of Land and Surveys, Sabah, 1964, printed by the Malaysian Directorate of National Mapping, 1967³⁵. The same comment applies as for the map discussed under (iv) above.
- (vi) *Oil Prospecting Licences and Leases*, Malaysian Ministry of Lands and Mines, 1968³⁶. This highly relevant map shows the "international boundary" very clearly as the 4° 10' N line extending to the east of the disputed islands. There is no disclaimer on the map. Malaysia has not even attempted to explain why

³¹ IM, Map Atlas, Map No. 11.

³² *Ibid.*, Map No. 13.

³³ ICM, Map Annex, Map A.1.

³⁴ IM, Map Atlas, Map No. 12.

³⁵ *Ibid.*, Map No. 14.

³⁶ *Ibid.*, Map No. 16.

an official Ministry of the Malaysian Government depicted the boundary in this fashion if not as a reflection of the 1891 Convention.

- (vii) *Continental Shelf Boundaries Between Indonesia and the Republic of Malaysia*, Annexure "A" to Agreement, Jabatanarah Pemetaan Negara, Malaysia, No. 30, 1969³⁷. Once again, the 4° 10' N line appears on this map.
- (viii) *Malaysia Timor Sabah*, Malaysian Department of Land and Surveys, Sabah, 1964, printed by the Malaysian Directorate of National Mapping, 1972³⁸. This map is similar to the maps discussed under (iv) and (v) above despite the fact that it was printed after the 1969 negotiations between the Parties had taken place.
- (ix) *Negeri Sabah, Population and Housing Census, Map Showing Distribution of Population*, 1970, Malaysian Department of Statistics, 1974³⁹. This map contains a disclaimer as to boundaries, but still depicts the 4° 10' N line extending to the east of Sipadan and Ligitan.

3.42 As noted above, it is significant that, even after the dispute arose in 1969, Malaysia continued to publish maps showing a line extending seaward from the island of Sebatik along the 4° 10' N parallel of latitude. The endorsement of this line in practice was also corroborated by the activities of Malaysia and Indonesia in licensing petroleum activities in the area before 1969 and in erecting navigational aids on Roach Reefs and Alert Patches in 1994⁴⁰.

3.43 The striking fact about this substantial body of cartographic material is the consistent appearance, particularly on the BNBC (Stanford) and Malaysian official maps, of a line extending offshore from the east coast of the island of Sebatik. While Malaysia has failed to give any reason for the line's presence on these maps, the only possible explanation is that the

³⁷ *Ibid.*, Map No. 17.

³⁸ *Ibid.*, Map No. 18; MM, Map Atlas, Map No. 21.

³⁹ IM, Map Atlas, Map No. 20.

⁴⁰ IM, paras. 8.41-8.45; see also Sections 2 and 3, above.

4° 10' N line reflected the understanding of all relevant parties that the 1891 Convention line continued beyond the east coast of Sebatik. The repeated depiction of this line on official Malaysian cartography is a clear admission against Malaysia's interest and represents compelling evidence that Malaysia itself viewed the line of separation between it and Indonesia as following the 4° 10' N parallel beyond Sebatik Island such that Sipadan and Ligitan fell on the Indonesia side of the line.

PART 2

THE ABSENCE OF ANY MALAYSIAN TITLE TO THE ISLANDS

CHAPTER IV

THE RE-ORIENTATION OF MALAYSIA'S POSITION

4.1 In its Memorial, Malaysia advanced a confused and inherently contradictory position with respect to the chain of title by which it allegedly acquired sovereignty over the islands of Sipadan and Ligitan. Malaysia's principal position was expressed in the very first paragraph of its submission on the question of title under the rubric "The Core of Malaysia's Case". That position was as follows:

"Those [*i.e.*, Malaysia's] predecessors in title were, from 1878, the British North Borneo Company (hereinafter "the Company"), which in 1889 came under the protection of Great Britain (hereinafter "Britain") and then Britain itself, after it had changed the status of North Borneo from a protectorate to a colony in 1946"¹.

4.2 The Court will note that there was no suggestion of any Spanish or United States chain of title in this proposition. Title was alleged to have vested in the BNBC in 1878 by virtue of the grant from the Sultan of Sulu to Messrs. Dent and Overbeck. Since this grant only related to islands situated within nine miles of the north Borneo coast – and Malaysia admits that Sipadan and Ligitan lie more than nine miles from the coast – Malaysia tried to buttress its arguments by asserting that the 1903 Confirmation of Cession from the Sultan of Sulu to the BNBC, which Malaysia admits was not viewed as legally valid by the British Government, covered Sipadan and Ligitan even though that instrument did not refer to these two islands, and the islands that were named in the Confirmation all lay to the north of the 4° 10' N latitude².

¹ MM, para. 2.1.

² Indonesia demonstrated that the 1903 Confirmation, whatever its legal effect, did not relate to Sipadan and Ligitan at paras. 4.27-4.37 of its Counter-Memorial.

4.3 Malaysia also advanced a second theory in its Memorial regarding its alleged chain of title. According to this second theory:

"the islands of Ligitan and Sipadan have during the last two centuries been under the sovereignty, first, of the Sultan of Sulu, then of Spain, then of the United States, then of Great Britain and now of Malaysia"³.

4.4 Clearly, as Indonesia pointed out in its Counter-Memorial, both of Malaysia's arguments cannot be correct. If title to the islands is said to have vested in the BNBC after 1878, then it cannot logically be maintained that sovereignty rested simultaneously with Spain or, after the 1900 U.S.-Spain Treaty, with the United States⁴. In point of fact, Indonesia has shown in its Counter-Memorial that both chains of title are fatally flawed. Nonetheless, the contradiction in Malaysia's Memorial was glaring and served to undermine the overall credibility of Malaysia's case as a whole.

4.5 In Malaysia's Counter-Memorial the position has changed. Although Malaysia does not expressly abandon its contention that the BNBC acquired title to the disputed islands in 1878, it is clear that Malaysia appreciates the difficulty of its position and thus now argues that it is the chain of title passing through Spain, thence to the United States, and thence to Great Britain (subsequently Malaysia) upon which its case principally rests.

4.6 This change of position is evidenced by the following statement which appears at paragraph 2.2 of Malaysia's Counter-Memorial:

"Malaysia's claim is based on acquisition by Spain of the possessions of the Sultan of Sulu. The islands adjacent to North Borneo which were situated beyond the three maritime league limit of the 1878 Sulu grant, Ligitan and Sipadan among them, remained under Spanish sovereignty. These possessions were transferred to the United States by the Treaty of 7 November 1900. The United States in turn transferred them to Great Britain by the Treaty of 2 January 1930"⁵.

³ MM, para. 4.2.

⁴ See ICM, paras. 2.10-2.11, 3.5 and 4.1-4.3.

⁵ Elsewhere in its Counter-Memorial, specifically at paras. 3.18 and 3.29, Malaysia confirms that the key element of its claim is the 1930 Anglo-U.S. Convention in which, it is alleged, the United States "ceded to Britain" the islands of Sipadan and Ligitan.

4.7 There is no room in this formulation for any co-existing British claim of sovereignty over the islands. In 1878, the islands were said to be Spanish. In 1900, they were said to have been transferred to the United States. And in 1930, they were claimed to have been ceded to Great Britain.

4.8 The only vestige of Malaysia's assertion of title passing through the BNBC is in Chapter 3 of its Counter-Memorial⁶. There, Malaysia makes a half-hearted attempt to keep the disavowed 1903 Confirmation of Cession in play by asserting that the Confirmation "was considered as covering Ligitan and Sipadan"⁷.

4.9 As Indonesia demonstrated in its Memorial and Counter-Memorial, the 1903 Confirmation did nothing of the sort⁸. Malaysia accuses Indonesia of "question begging", but the situation is straightforward.

- (i) It is a fact that the 1903 Confirmation was viewed as legally invalid by the British Government.
- (ii) It is a fact that the Confirmation did not name either Sipadan or Ligitan when it would have been perfectly possible to do so since other islands of a similar small size were so named⁹.
- (iii) It is a fact that all of the islands listed in the Confirmation lay to the *north* of the 4° 10' N latitude which had been agreed as separating Dutch and British possessions in the 1891 Convention.
- (iv) And it is a fact that the Stanford Company, which acted as the BNBC's official cartographer, published a map just four months after the Confirmation was issued which depicted the offshore limits of the BNBC's territorial possessions

⁶ MCM, paras. 3.15 and 3.16.

⁷ *Ibid.*, para. 3.16.

⁸ IM, paras. 7.15-7.16; ICM, paras. 4.27-4.33.

⁹ Malaysia asserts that the reason why Sipadan and Ligitan were not listed in the 1903 Confirmation was because the Confirmation only named inhabited islands (MCM, para. 3.16). Suffice it to note that Malaysia has failed to introduce any evidence to support this assertion.

as including all of the islands named in the 1903 Confirmation, but which expressly adopted the 4° 10' N line of latitude as the southern limit of those possessions thus excluding Sipadan and Ligitan, both of which lie to the south of this line.

4.10 Stanford's maps of British North Borneo during the relevant period are of considerable interest. While reference has been made to the map prepared by Stanford in August 1903 – a reproduction of which may be found opposite page 54 of Indonesia's Counter-Memorial and as Map No. 9 in Indonesia's Map Atlas – there are a number of additional maps which show with great clarity that the BNBC recognised the 1891 Convention boundary as extending out to sea along the 4° 10' N parallel of latitude. These maps have been taken from successive editions of Stanford's London Atlas of Universal Geography.

4.11 Map 4, facing this page, is a reproduction of a map taken from Stanford's London Atlas of Universal Geography published in 1887 – in other words, four years before the 1891 Convention was concluded¹⁰. On this map, the southern limits of British North Borneo are shown as extending roughly along the Sibuku River south of the Island of Sebatik. This was in conformity with the BNBC's views at the time of the limits of its possessions. Significantly, the southern boundary is not extended out to sea, although there is a curved red line in the Sulu Sea which ostensibly depicts the limits of what were thought to be Spanish possessions in the area. Contrary to Malaysia's current assertions, the map shows that Spain was not viewed as having any territorial pretensions lying south or west of Sibutu Island and its immediate dependencies.

4.12 In the 1894 edition of the atlas, Stanford published another map of the same region. It has been reproduced following Map 4 as Map 5¹¹. Since this map post-dated the 1891 Convention, it depicted the boundary between Dutch and British possessions agreed in that Convention. What is significant is that the southern limits of British North Borneo can now be seen to extend out to sea from the Island of Sebatik along the 4° 10' N line of latitude to a

¹⁰ The full map and atlas front-sheet are at Annex 24.

¹¹ The full map and atlas front-sheet are at Annex 25.

point well to the east of Sipadan and Ligitan. There can be no other explanation for this southern limit than the fact that it reflected the territorial boundary between British North Borneo and Dutch possessions agreed upon in the 1891 Convention. British possessions were clearly seen to be limited to areas lying to the north of 4° 10' N latitude.

4.13 The next map, displayed overleaf as Map 6, is a similar Stanford map published in the 1904 edition – i.e., one year after the 1903 Stanford map which Indonesia produced in its earlier pleadings¹². For all intents and purposes, it is the same as the 1903 map. The southern limits of British North Borneo still track the 4° 10' N line of latitude. Indeed, on the 1903 Stanford map, the red lines extending out to sea are specifically identified as the boundaries of the BNBC provinces.

4.14 In its Counter-Memorial, Malaysia concedes that Sipadan is outside of the boundary of British North Borneo as shown on the 1903 Stanford map. Paradoxically, however, Malaysia claims that "the map shows Ligitan as within the administrative boundary of Elphinstone Province"¹³. This is simply not true. Both the 1903 and the 1904 Stanford maps label "Ligitan Reef" in such a way as to straddle the 4° 10' N line. But Ligitan Island is too small to appear independently on the map. Nonetheless, it must be recalled that Malaysia itself has identified Ligitan as lying on the 4° 09' 48" N parallel of latitude – in other words, *south* of the 4° 10' N line¹⁴. Since the dashed red line appearing on the map as the southern limit of British North Borneo extends eastwards from Sebatik along what can only be the 4° 10' N parallel, Ligitan must lie to the south of that line.

4.15 With respect to Sipadan, Malaysia argues that it is not shown as Dutch. But what else could it be? Sipadan was not deemed to be part of British North Borneo because it lay outside the red line boundary which, as on the mainland, constituted the boundary between Dutch and British possessions. Nor was it deemed to form part of Spanish or, subsequently, U.S. possessions in the region. The 1887, 1894, 1903 and 1904 Stanford maps all label Sibutu Island and its immediate dependencies as belonging either to Spain or, post-1900, to the

¹² The full 1904 map and atlas front-sheet are at Annex 26.

¹³ MCM, para. 3.15.

¹⁴ *Ibid.*, para. 1.4. These same co-ordinates for Ligitan are recorded at para. 3.9 of Malaysia's Memorial.

United States. But Sipadan and Ligitan are not similarly labelled. Since they lay to the south of the line agreed in the 1891 Convention depicted on the map, the only conclusion is that they were deemed to be Dutch just as mainland territories south of the line were also Dutch.

4.16 Given the re-orientation of Malaysia's case away from a chain of title passing from the BNBC, to Britain and thence to Malaysia, it is unnecessary at this stage to comment further on Malaysia's assertions in this respect. Malaysia's principal claim now appears to centre on the allegation that Spain originally possessed title to the islands in question and that this title was inherited by the United States in 1900 and then ceded to Great Britain in 1930. Indonesia will expose the fallacies in this line of argument in Chapter VI.

4.17 Malaysia also continues to assert that it administered both Sipadan and Ligitan notwithstanding the existence of a so-called Spanish or U.S. title over them. These contentions which, if anything, are given greater prominence in Malaysia's Counter-Memorial due to the weakness of Malaysia's arguments based on a treaty title, are dealt with in Chapter VII. Suffice it to note here that any such administration – and there was none on Sipadan and Ligitan at least prior to the 1917 Turtle Ordinance – could not displace a legal title lying elsewhere.

CHAPTER V

NON-EXISTENCE OR UNCERTAINTY OF PRE-COLONIAL TITLES

5.1 In its Counter-Memorial, Malaysia revisits the pre-1891 situation at length, especially when it claims to describe the "Background to the Boundary Convention of 20 June 1891"¹ and when it describes "The extent of the Sultanate of Sulu before 1878"². The purpose of this chapter is to show that the extent of the possessions of the Sultanate of Sulu south of the 4° 10' N parallel was, to say the least, uncertain and that, in any case, Malaysia has not provided the slightest evidence of any presence of Sulu on the disputed islands, and that this excludes the existence of any pre-colonial title and, at the same time, the existence of the "chain of title" alleged by Malaysia.

5.2 In any event, as Indonesia has shown above³, the pre-1891 situation is not decisive in the present case: whatever the territorial situation might have been at the time, it was clarified and set up on a new basis by the 1891 Convention which put "an end to all difficulties in the future"⁴. Therefore, it is only to add surplus legal arguments and to avoid leaving any aspect of this case, however artificial, in any uncertainty that Indonesia will respond briefly to Malaysia's arguments.

5.3 In fact, it follows from Malaysia's own description of the territorial situation in this region that it was characterised by numerous uncertainties. In particular:

- uncertainties concerning the extension to the south of the Sultan of Sulu's possessions, in respect of which Malaysia gives a very misleading description (Section 1);
- uncertainties, acknowledged by Indonesia, concerning the exact extension to the north of the Sultan of Boeloengan's possessions, even though there is no

¹ MCM, paras. 2.4-2.20.

² *Ibid.*, paras. 3.7-3.14.

³ See paras. 1.23, 1.29(a) and 2.8-2.11.

⁴ See the Dutch Explanatory Memorandum, IM, Vol.3, Annex 77, p. 6.

doubt that, at the relevant time (1891), the possessions of the Sultan extended at least to Batoe Tinagat and the River Tawau (Section 2);

- uncertainties concerning the nature of the relations which may have existed between the local rulers and the inhabited islands in the region, which Malaysia fails to mention, and, *a fortiori*, the legal status of the disputed islands at that time, which has been entirely fabricated by Malaysia (Section 3).

All these uncertainties only go to confirm Indonesia's submission that to attempt to draw any consequences of a legal nature from the pre-1891 situation is useless for the settlement of this dispute (Section 4).

Section 1. The Malaysian Errors and Approximations Concerning the Southern Extension of the Sultan of Sulu's Possessions

5.4 Malaysia asserts correctly that "[t]he authority of the Sultan of Sulu on the coastal territory of northeast Borneo in the middle of the 19th century is not in dispute between the Parties to the present proceedings"⁵. However, this begs the question: it is not a matter of knowing whether the Sultan of Sulu exercised rights over possessions on the north-east coast of Borneo, which is certain, but rather of knowing the location of the southern boundary of these possessions and how the question was in fact resolved in regions where uncertainties existed.

5.5 Malaysia does not respond to this question clearly. It simply asserts that "the Sultan [of Sulu] claimed allegiance over a significant portion of the north and east coasts of Borneo, at least down to the Sibuko River"⁶, that the northern boundaries of the Sultanate of Boeloengan were uncertain (which is probably true, but does not entail the consequences drawn by Malaysia – as to which, see Section 2, below), and that "[t]he cape of Batu Tinagat [...] was the extreme eastern claim of The Netherlands on the east coast of Borneo"⁷. All this

⁵ MCM, para. 2.4.

⁶ *Ibid.*, para. 3.2.

⁷ *Ibid.*, para. 2.13.

is repeated a number of times⁸ and Malaysia draws the following consequences from these assertions:

- (i) "All the territory east of that point was considered British or Spanish territory by the Dutch authorities themselves"⁹; and
- (ii) the islands "were incontrovertibly part of the social and administrative system of Darvel Bay and surrounding islands"¹⁰, which fell under the authority of the Sultan of Sulu, to whom, it allegedly follows, Ligitan and Sipadan belonged.

5.6 The only argument put forward by Malaysia to justify its assertion that the sovereignty (or suzerainty) of the Sultan of Sulu extended "at least down to the Sibuko river" seems to be based on the grant by the Sultan of Sulu to Messrs. Dent and Overbeck of 22 January 1878 to whom he granted all his rights to and powers over the tributary territories and lands "to the southward thereof, bordering on Darvel Bay, as far as the Sibuco River [...]"¹¹.

5.7 As interpreted by Malaysia¹², the grant is based upon an erroneous understanding of the local geography: the Sibuko (or Sibuco) River does not flow into Darvel Bay but south of Nanoekhan into Sibuko Bay, and it is probable that in reality the 1878 grant was intended to refer to not "Sibuco River" but "Subakun River", which actually flows into Darvel Bay, as Count de Bylandt noted in his letter to Earl Granville of 1 December 1882:

"La notice que j'ai l'honneur de remettre ci-près à votre Excellence contient un ensemble de faits qui permettent de considérer comme fort probable que la rivière désignée dans les Concessions sous le nom de 'Siboehoe' est située à l'est de Batoe Tinagat et par conséquent en dehors du territoire néerlandais"¹³.

⁸ See, for example, *ibid.*, paras. 2.18, 2.20(b), 3.1(a), 3.8 and 3.9.

⁹ *Ibid.*, para. 2.20(b).

¹⁰ *Ibid.*, para. 3.3; see also, para. 3.5.

¹¹ See IM, Vol. 2, Annex 17.

¹² As, it must be said, Great Britain had earlier: see the Proceedings of the Joint Commission, First Meeting, 16 July 1889 (IM, Vol. 3, Annex 57, p. 4), in which the British Government maintained that "the Sibuco River mentioned in the Dent and Overbeck Grants was that situated in about 4° 4' north latitude, and was not the 'Sibuco' incorrectly marked on the Admiralty Chart about that date as being near Tawao River before any survey had been made".

¹³ IM, Vol. 2, Annex 31, p.12, quoted in MCM, para. 2.14.

5.8 Moreover, the British Government itself seemed at this time to harbour certain doubts as to the exact location of this river, which allowed Count de Bylandt to conclude in this letter that this uncertainty:

"[...] est trop grande pour que le fait qu'elle est mentionnée comme limite des Concessions, puisse infirmer les données positives à l'égard de la frontière Néerlandaise telle qu'en premier lieu le contrat avec Boelongan la définit"¹⁴.

5.9 Furthermore, as said above, The Netherlands immediately protested this claim. Hence, in his letter to Earl Granville, Count de Bylandt, while maintaining very strongly the Dutch view that the border was fixed, and should remain to be fixed, at Batoe Tinagat, indicated in diplomatic but firm terms that the river "Siboehoe" was located east of Batoe Tinagat, and consequently outside Dutch territory¹⁵. In a despatch to Count de Bylandt dated 22 December 1888 which was communicated to Lord Salisbury on 3 January of that year, Mr. Hartsen, the Dutch Minister of Foreign Affairs, reiterated that "les droits de souveraineté des Pays-Bas [sur Batoe Tinagat ...] ne sauraient être contestés"¹⁶, and in a further despatch dated 19 March 1889 (communicated to Lord Salisbury on 27 March) he insisted that "il est constaté que la Rivière Siboeckoe se jette dans la mer près de l'Île de Nanokong" and that the Netherlands Government "n'a pas eu la moindre incertitude sur la situation de cette rivière"¹⁷.

5.10 It is in this context that Great Britain was notified of the Contract renewed in 1878 between The Netherlands and the Sultan of Boeloengan, to which Malaysia refers in paragraph 2.9 of its Counter-Memorial. In this respect, two points should be noted:

- Firstly, even if the 1850 contract was not notified to Great Britain, the same cannot be said of the 1878 contract, which was notified to Great Britain on 17 January 1880¹⁸. Thus, as from that date the British Government was informed of the Dutch claims, and could not claim that there had been a breach of the 1824 Treaty;

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ IM, Vol. 2, Annex 37.

¹⁷ *Ibid.*, Annex 47, p. 1; see also IM, Vol. 3, Annex 58, p. 3.

¹⁸ In this respect, see IM, paras. 3.22 and 4.63 and Sir E. Hertslet's Further Memorandum on the Disputed Boundary dated 9 January 1889 at IM, Vol. 2, Annex 38.

- Second, Great Britain did not protest this notification, which must be interpreted as an acquiescence, *a fortiori* since on several occasions the Netherlands Government re-stated this to the British Government, which did not respond for several years – see, for example, Mr. Hartsen's despatch to Count de Bylandt of 22 December 1888: "le Gouvernement de Sa Majesté britannique n'a jamais fait le moindre obstacle ni la moindre observation quant au contenu du Contrat Politique du 2 juin, 1878, avec le Sultan de Boeloengan"¹⁹.

5.11 Moreover, whilst Malaysia in its Memorial²⁰ revisits at length the alleged acts of administration of Sulu over Semporna and the Bajau population of Dinawan (which are scarcely more than sporadic demonstrations of allegiance for pure expediency, which as such cannot "prevail against a legal title"²¹), it has not, either in its Memorial or in its Counter-Memorial, provided the slightest *prima facie* evidence of any Sulu presence south or west of Batoe Tinagat, and has not even gone so far as to allege any such presence²². To the contrary, in its Memorial Malaysia reinforces Indonesia's thesis, as it appears in Annex 88 to Malaysia's Memorial (the *British North Borneo Herald* article dated 2 February 1903), that Dinawan is the southernmost island of the "Bajau country"; this phrase designating, according to Malaysia, not the area where the Bajau Laut were present, but the area in which Malaysia attributes influence to the Sultan of Sulu over these populations and not sovereignty²³. The article states in relevant part that: "The [Sulu] Bajau country may be said to lie within a square formed by Latitude 4° and 5° N and Longitudes 118° and 119° E [...]. The most easterly and southerly boundary of the Bajau country is the island of Danawan". This island is north of Batoe Tinagat and north of Ligitan and Sipadan. Indonesia has previously shown that the presence of those Bajau Laut was not limited to this area²⁴. It would thus follow from Malaysia's own reasoning that the influence of the Sultan of Sulu was limited to the Bajau

¹⁹ IM, Vol. 2, Annex 37.

²⁰ See MM, paras. 3.7, 5.7 *et seq.* and 6.5 *et seq.*

²¹ See *Dubai/Sharjah Border, Award, 19 October 1981*, ILR 91, p. 543 at p. 650, para 210; ICM, paras. 3.41 *et seq.*

²² See also Section 3, below.

²³ See ICM, para. 3.57.

²⁴ *Ibid.*, paras. 3.26 *et seq.*

Laut who were living in this more northern area, which amounts to an acknowledgement that the Sultan of Sulu had no influence outside that area.

5.12 A preliminary conclusion can thus be drawn: the presence of Sulu, however virtual or theoretical it may have been in the Semporna peninsula, in Dinawan or in Si Amil, never extended south of that area. Malaysia acknowledges this implicitly in stating, "[t]he east coast settlements of the BNBC [which it describes as being the successor to the Sultan of Sulu] – including Sandakan, Lahad Datu, Semporna and *after 1892*, Tawao – became the new focus of the trade and administration of the local Bajaus"²⁵. It is only after the 1891 Convention was concluded that the BNBC was able to move into the southern areas and establish a long-term presence at Tawau, at the mouth of the river of that name. Prior to that date neither the BNBC nor Sulu had been established there.

5.13 Had the situation been different and the Sultanate of Sulu actually been established south of Batoe Tinagat, or, simply stated, had the Sultanate of Sulu had any claims over that area, no consequences could be drawn from this from a legal point of view: the only consequence would have been that the claims of Sulu (and Great Britain) on the one hand, and of Boeloengan (and The Netherlands) on the other, would have overlapped, and Indonesia has shown in its Memorial²⁶ that such a phenomenon frequently occurred in that part of the world at that time. Moreover, Malaysia acknowledges this elsewhere in its pleadings: "[T]he overlapping claims in the south were bound to create conflict"²⁷. Furthermore, after having referred to Milner's book, *Kerajaan* (1982 – no page indicated) in which it is explained that "[t]erritorial borders [of Malay States] were often unknown [...]. The actual location of the Malay state, in fact, appears to have been of little importance"²⁸, Professor V.J.H. Houben, in his short study attached to Malaysia's Counter-Memorial as Appendix 1, explained that "Dutch and British claims, based on their contracts with respectively, Boeloengan and Sulu, overlapped"²⁹. Overlaps certainly do not create good legal title – but they do give rise to uncertainties, which need to be resolved if conflict is to be avoided.

²⁵ MCM, para. 3.2, p. 53. Emphasis added.

²⁶ IM, paras. 4.20-4.45.

²⁷ See MCM, para. 2.12; see also para. 2.4.

²⁸ *Ibid.*, Appendix 1, para. 4.4.

²⁹ *Ibid.*, para. 5.2.

Section 2. The Erroneous Consequences Drawn by Malaysia on the Probable Northern Boundary of the Sultanate of Boeloengan

5.14 Indonesia does not dispute the fact that as from 1850 The Netherlands admitted that the territory of Boeloengan did not extend beyond the cape of Batoe Tinagat³⁰, and Count de Bylandt confirmed this position in his letters of 1882 and 1888, referred to above, although the Sultan of Boeloengan had in certain circumstances affirmed that his influence extended further to the north³¹. However, Malaysia presents the consequences of this admission in a very deceptive way: on the one hand, it devotes itself to attempting to cast doubts on the reality of this extension; on the other, it draws erroneous conclusions from this situation.

5.15 Despite the doubts stated by Malaysia³², it is indisputable that, while the 1891 Convention was being negotiated, The Netherlands were actually established in Batoe Tinagat. This follows from the chronology presented in the Malaysian Counter-Memorial:

- at the outset, The Netherlands had provisionally set at 3° 20' N the outer boundary of the parts of Borneo over which it exercised influence³³;
- in 1849, The Netherlands made no reference to a northern boundary³⁴;
- in 1850, The Netherlands concluded a contract with the Sultan of Boeloengan, recognising that the boundaries of the Sultanate extended "at sea" up to a "cape named Batoe Tinagat, as well as the Tawau River"³⁵;

³⁰ See the Contract between the Government of the Netherlands East Indies and the Sultan of Boeloengan of 12 November 1850, IM, Vol. 2, Annex 13.

³¹ See the "Notes concerning the North-East Coast of Borneo" by H. von Dewall published in *Tijdschrift voor Indische Taal-, Land- en Volkenkunde*, Deel IV, Nieuwe Serie, Deel I, 1855, which state at p. 423 (in translation): "There was a sentiment in 1849 to fix this point [the most northern point of the boundary of the Dutch possessions on the eastern coast of Borneo] at 5° 40' (the bay of Sandakan), or indeed at 6° 25' (bay of Paitan or the river Soegoet)", at Annex 1 of this Reply.

³² See, for example, MCM, paras. 2.4 and 2.12.

³³ Resolution of the Governor-General of The Netherlands East Indies of 28 February 1846, IM, Vol. 2, Annex 10, quoted at MCM, para. 2.6.

³⁴ See IM, Vol. 2, Annex 12.

³⁵ *Ibid.*, Annex 13, quoted at MCM, para. 2.8.

- throughout the negotiations leading up to the 1891 Convention, The Netherlands stuck to this boundary³⁶.

5.16 This development must be considered in its context. In this region, the middle of the 19th century was a period of steady and intensive European expansion. Consequently, it is not surprising that the Dutch promptly modified their territorial claims in order to thwart those of the Spanish and British who were becoming a threat, and at the same time to clarify their relations with the Sultan of Boeloengan. Furthermore, there is nothing surprising about the fact that the Dutch Government admitted before Parliament that their claims were "not in reality indisputable"³⁷ (which does not mean that they were unsustainable). It was undoubtedly the case that the respective claims of all the local rulers were "not in reality indisputable"³⁸, and once again, these Dutch admissions must be considered in their proper context: the Dutch Government was trying to justify to Parliament their withdrawal from their northerly positions to the 4° 10' N parallel. A perfectly understandable and politically natural way of doing so was to explain that those northerly claims were, in any event, rather weak or "imaginary" and that they had not really given up anything of substance.

5.17 In any event, and despite this political prudence, at the time the British-Dutch rivalry intensified in the area the Dutch were actually present in Batoe Tinagat and Tawau. This appears very clearly in a document which Malaysia would have difficulty contesting, since it is the report drafted by Professor V. J. H. Houben upon Malaysia's request, entitled "The Regional History of Northeast Borneo in the Nineteenth Century (with special reference to Bulungan)", reproduced as an appendix to the Malaysian Counter-Memorial. The author, who insists that "abstention", was "a leading principle of Dutch policy in the region"³⁹, strongly qualifies what he says: "In this respect it is very important to note that there were two clearly marked periods of Dutch activity on Borneo, one in the mid-1840s and another from 1877 onwards. Both episodes of Dutch action, which were in clear deviation from the official policy of abstention concerning the Outer Islands, were essentially reactions against what was perceived as an acute English threat"⁴⁰. Moreover, Professor Houben acknowledges that a

³⁶ See IM, paras. 5.1-5.23, and IM, Vol. 2, Annexes 27, 29 and 40.

³⁷ *Ibid.*, Vol. 3, Annex 84; see MCM, para. 2.16.

³⁸ See IM, paras. 4.20 *et seq.* and ICM, paras. 3.81-3.83.

³⁹ MCM, Appendix 1, para. 2.2; see also para. 3.2.

⁴⁰ *Ibid.*, para. 3.2; see also paras. 3.3-3.5.

Dutch controller was stationed at Muara Tawau from 1882 to 1889⁴¹. However, he fails to mention other significant facts such as:

- the Dutch naval patrols in the area⁴²;
- in particular, the voyage of HNLMS *Admiraal van Kinsbergen*, the log book of which refers to cruising around Sipadan and landing armed sloops on the island of Mabul (which lies further to the north)⁴³;
- a letter from Sir Rutherford Alcock to Sir Julian Pauncefote dated 11 January 1884 referring to Dutch men-of-war cruising "north of the boundary they themselves claim, viz., Batu Tinagat"⁴⁴. As a glance at a map of the area shows, this must be a reference to the waters off the south coast of the Semporna peninsula, well to the north of Sipadan and Ligitan, and the same area as that in which the *Admiraal van Kinsbergen* was cruising; and
- the fact that the British Admiralty pilots state that, in 1890, the only information the British Admiralty had on Sebatik Island "is from the Dutch chart"⁴⁵, which shows, at least, that the Dutch were active in the region, whilst the British had to rely on Dutch information (see also the advertisement to the 1902 edition of that same document: "many scientific expeditions have been sent by the Dutch Government"⁴⁶).

5.18 Moreover, it is interesting to note that Professor Houben shows that contemporaneous with the renewed activity of the Dutch, the Sultan of Sulu's influence in the region weakened (which had been exercised over "Bulungan's trade", not over Boeloegan's territory)⁴⁷ and the

⁴¹ *Ibid.*, para. 5.2; see also IM, paras. 4.64 and 5.4 and MCM, para. 2.12.

⁴² See, for example, ICM, paras. 3.67-3.68.

⁴³ See *ibid.*, Vol. 2, Annex 12.

⁴⁴ Annex 2 to this Reply.

⁴⁵ MCM, Vol. 2, Annex 1, p. 190.

⁴⁶ Annex 4 to this Reply. Emphasis added.

⁴⁷ See MCM, Appendix 1, para. 6.3, see also para. 7.iii.

"Sulu's hegemony declined"⁴⁸. He also shows that during that period, "Bulungan itself started to play a central role in the slave trade of the region"⁴⁹ like the Semporna Bajau Laut⁵⁰, which shows that there were at least relations between them.

5.19 Malaysia gives few concrete and precise arguments to illustrate its assertions according to which Boeloengan did not control the northern area claimed by The Netherlands. The few details it gives in this respect are nothing but misleading approximations. Namely:

- The administrators of the BNBC did not venture so far south until 1891, whereas the Dutch were already present in Tawau during the years preceding the signature of the 1891 Convention, and, as admitted by Malaysia, it was only after 1892 that the BNBC established a settlement in Tawau⁵¹;
- In no way can The Netherlands be said to have accepted in 1891 "the effect of the 1878 grant in relation to the northern half of Sebatik itself and areas inland"⁵². They did – which is completely different – accept a compromise which in no way implied any "acceptance" of the interpretation of the 1878 grant then given by Great Britain and fully incompatible with the wording used⁵³;
- it is difficult to see how the Dutch map of 1913, to which Malaysia refers at the end of paragraph 3.9 of its Counter-Memorial, could in any way be interpreted to show the situation existing prior to 1891 (or even 1878) that it is supposed to illustrate.

5.20 Moreover, Malaysia ignores a number of important elements. Some have been explained in the Indonesian Memorial⁵⁴ and Counter-Memorial⁵⁵. Others deserve to be mentioned here. For example:

⁴⁸ *Ibid.*, para. 6.3.

⁴⁹ *Ibid.*, para. 6.4.

⁵⁰ *Ibid.*, paras. 6.3 and 7.iii.

⁵¹ *Ibid.*, para. 3.2.

⁵² *Ibid.*, para. 3.9.

⁵³ See para. 5.9, above.

⁵⁴ IM, paras. 4.47-4.71.

⁵⁵ ICM, paras. 3.66-3.73 and 5.42.

- as early as 1850 the Dutch Minister of Finance announced before the Second Chamber of the Dutch Parliament that: "les dernières enquêtes ont appris que des Chefs Boelongans sont établis sur les territoires riverains de quelques petites rivières jusqu'au 4° 20' de latitude nord"⁵⁶;
- again, in 1879, the Dutch Minister of the Colonies in a parliamentary reply concerning the 1878 grant, indicated:

"As far as the Sulu concession is concerned it is not quite certain whether the contracting parties were well acquainted with the precise frontier-line of the Netherlands territory on the east coast of Borneo. With a view to preventing possible misapprehensions, orders have been issued for the Netherlands flag to be hoisted on the border (at the Bato Tinagat Rock, situated at the mouth of the Tinagat River in 4° 19" north latitude and 117° 51" east longitude, according to the last survey) to be placed for the present under the protection of a cruiser, whilst the Sultan of Boloengau has been requested to maintain a Representative at this point on his side of the frontier-line in question"⁵⁷.

- similarly, during the Anglo-Dutch negotiations in July 1889, Count de Bylandt remarked that:

"a distinct proof of the fact that Tidoeng did not belong to Sulu was the fact that the population paid taxes to the Sultan of Boelongan; that they had often claimed protection from the Netherlands authorities; and had themselves denied that they had any relations with Sulu"⁵⁸.

- furthermore, it is most interesting to note that, in 1895, four years after the Dutch-British Convention establishing a new boundary, it was reported in the *British North Borneo Herald* that:

"The British North Borneo Government drew the attention of the Governor-General to the fact that the authorities of Bulongan, a Netherlands India vassal State, had been levying taxes on territory in the neighbourhood, which had

⁵⁶ Quoted in Memorandum on the Dutch Frontier on the North-east Coast of Borneo by Sir E. Hertslet, 20 June 1882, IM, Vol. 2, Annex 28, p. 4.

⁵⁷ MM, Vol. 3, Annex 40, quoted at MM, para. 7.6.

⁵⁸ IM, Vol. 3, Annex 57, p. 7.

been ceded by the Dutch Government to the British North Borneo Company in 1892. The Netherlands India Government warned the Sultan of Bulongan against doing anything of the kind in future, upon which the Sultan apologised to the authorities at Sandakan for his officials' transgression"⁵⁹.

5.21 This last incident is extremely revealing. It shows that:

- the British North Borneo press clearly considered that the territory north of the 4° 10' N parallel had been ceded by the Dutch to the British;
- the Sultan of Boeloengan was still active in this region long after the cession – which would also indicate that his officials had been present there before; and
- Boeloengan was not as deprived of governmental structures as Professor Houben tends to show in his note⁶⁰.

5.22 Several things can be learned from the situation existing prior to the conclusion of the 1891 Convention, namely:

- the Sultan of Sulu had never exerted any physical presence south of Darvel Bay; any presence that he had was only manifested as a form of commercial influence, which in any event was receding;
- despite its so-called policy of abstention, The Netherlands had strengthened their presence in the region;
- whatever the real or supposed borders of the Sultanate of Boeloengan were (the territorial borders of the Malay and Borneo States were unclear, as Professor Houben insists in his report), the Dutch were nonetheless established at Batoe Tinagat and Tawau.

⁵⁹ ICM, Vol. 2, Annex 13.

⁶⁰ MCM, Appendix 1, paras. 4.1-4.9.

5.23 The conclusion Malaysia draws from this situation (i.e., that which is described in the Malaysian Counter-Memorial and in its Appendix, which forms almost the only source for the above description) is very questionable: namely that it follows that all territory located "east of Batu Tinagat" belongs to Malaysia. To draw such a conclusion would be reckless. It is true that this expression has been used *once* (in French: "à l'est de Batoe Tinagat") by Count de Bylandt in 1882⁶¹, and possibly twice if the reference by the Dutch delegation to the Joint Commission of 19 July 1889 is also counted⁶², but it certainly does not justify the *leitmotiv* which it is accorded in the Malaysian Counter-Memorial⁶³, the only purpose of which appears to be to give the impression that The Netherlands had given up all claims and all presence east of that point.

5.24 Of course, it is nothing of the sort. The use of the expression "à l'est de Batoe Tinagat" must be interpreted in the light of its context, i.e., of a discussion relating entirely to the "north-south": the aim for Count de Bylandt had been to clarify the *southern* limit of the concession granted by the Sultan of Sulu, and at the same time the *northern* limit of the Dutch expansion. This is confirmed by the statement of Count de Bylandt cited by Malaysia at paragraph 2.14 of its Counter-Memorial:

"Le Gouvernement du Roi a cru devoir prendre comme limites extrêmes à l'ouest: Tandjong Datoe, et à l'est: Batoe Tinagat, étant donné que les droits de souveraineté des Pays-Bas sur ces deux points extrêmes de l'Ile de Bornéo ne sauraient être contestés"⁶⁴.

If the Sultan and The Netherlands had wanted to draw a line from east to west, the purpose would have been to establish clearly the limit between the territories located to the *north and south* of this line. And it is clear that the area located *north* of this line was that which The Netherlands considered to fall beyond Dutch territory.

⁶¹ See paras. 5.7 and 5.9, above.

⁶² MCM, para. 2.15.

⁶³ See paras. 5.5 *et seq.* above.

⁶⁴ IM, Vol. 2, Annex 37.

Section 3. The Malaysian Errors and Extrapolations Concerning the Ownership of the Disputed Islands before 1891

5.25 The islands of Ligitan and Sipadan certainly lie "to the east" of Batoe Tinagat; but they are also – and particularly for the purposes of the present case – *to the south* of the northern limit of the territory claimed by The Netherlands in the name of the Sultan of Boeloengan. This territory was effectively occupied by them just as the Anglo-Dutch rivalry which preceded the conclusion of the 1891 Convention was at its height. They also lie *to the south* of the boundary formed by the parallel 4° 10' N, as fixed by the 1891 Convention. Moreover, at that time the Dutch clearly considered that Mabul Island, which is to the *north* of the two disputed islands *and to the east of Batoe Tinagat*, belonged to the Sultan of Boeloengan, from whom they had obtained their title⁶⁵.

5.26 Malaysia, which appears to attach importance only to the "east-west" dimension, despite the fact that the territorial dispute between Great Britain and The Netherlands over Borneo was clearly "north-south" based, goes to great lengths to try to substantiate the theory that the disputed islands belonged to the Sultanate of Sulu. These arguments are as follows:

- (a) there was no indication "that islands so far at sea as Sipadan and Ligitan were concerned by that boundary delimitation"⁶⁶; the only relevant islands "were the islands of Tarakan, Nunukan and Sebatik and the 'small islands belonging thereto' or 'adjacent' to those islands"⁶⁷;
- (b) the Sultan of Boeloengan, who was concerned to preserve the rights of his subjects to collect forest products between Broershoek and Batoe Tinagat, "at no time asked for the right to collect products of the sea on islands east of Batu Tinagat"⁶⁸;

⁶⁵ ICM, para. 3.67.

⁶⁶ MCM, para. 2.10; see also para. 3.9.

⁶⁷ *Ibid.*, para. 2.20(c).

⁶⁸ *Ibid.*, para. 2.18.

- (c) the Bajau Laut "principally based on Danawan, the headmen of which had the right (confirmed by the Sultan of Sulu) to collect turtle eggs on Sipadan", "were considered as a Sulu population" and were not "under the authority of Bulungan and The Netherlands"⁶⁹;
- (d) in fact, islands "such as Sipadan and Ligitan [...] were administered by the BNBC and were occupied and used by Bajaus who transferred their allegiance from the Sultan of Sulu to the BNBC"⁷⁰;
- (e) they "were part of the social system of the local people"⁷¹, that is, apparently, "the social and administrative system of Darvel Bay and surrounding islands"⁷²;
- (f) Boeloengan was "a small land-based sultanate [which had] no claim to effective control over the islands off the Semporna peninsula [*sic*]"⁷³. Even if the islands did not form part of the "Sulu archipelago", these "two small islands in Darvel Bay [*sic*]" belonged to "the dominions of Sulu"⁷⁴.

5.27 The confusions in terminology in these last two citations are certainly not fortuitous. The same may be said of the systematic use of the expression "east of Batu Tinagat"⁷⁵ a tactic designed to create an erroneous impression in the mind of the reader that the islands in question belonged to much larger entities whose legal status they automatically followed. In speaking of "islands off the Semporna peninsula" or "off Semporna"⁷⁶, or "in Darvel Bay" or of the "system of Darvel Bay", or of the "social system of the local people", or, slightly more subtly, of the "Ligitan group"⁷⁷ or "the group of islands associated with Ligitan reef"⁷⁸, the object is to deceive the reader into believing that, since we are concerned with a single entity, all of its "components" must have the same status: since Semporna clearly belongs to

⁶⁹ *Ibid.*, para. 2.16; see also para. 3.2.

⁷⁰ *Ibid.*, para. 3.1(c); see also paras. 3.2 and 3.9.

⁷¹ *Ibid.*, para. 3.5.

⁷² *Ibid.*, para. 3.3.

⁷³ *Ibid.*, para. 3.9.

⁷⁴ *Ibid.*, paras. 3.12 and 3.14.

⁷⁵ See paras. 5.5 *et seq.*, and 5.23-5.24, above.

⁷⁶ MCM, paras. 3.3 and 3.8.

⁷⁷ *Ibid.*, paras. 1.4, 3.5, 3.15, 3.26 and 3.28.

⁷⁸ *Ibid.*, para. 2.40.

Malaysia, the same must go for "the islands off Semporna"; since the authority of the Sultan of Boeloengan without doubt did not stretch to Darvel Bay, neither did it stretch to the "islands in Darvel Bay", etc.

5.28 Beyond these tactics, the problem is that Malaysia's assertions do not correspond to legal reality, or even, for the most part, to geographical reality (except as concerns the appurtenance of Ligitan to "Ligitan reef"): neither Ligitan nor Sipadan are situated in Darvel Bay; Sipadan does not belong to "Ligitan reef" or "group"; and if the two islands are indeed "off Semporna", they are not "adjacent" and do not "belong to it" in the sense Malaysia gives to these expressions⁷⁹. Furthermore, the islands display the characteristics of being situated to the south of, on the one hand, Batoe Tinagat⁸⁰ and, on the other, the 4° 10' N parallel – contrasting in both cases to Si Amil and Dinawan, to which Malaysia assimilates the disputed islands with disconcerting ease⁸¹.

5.29 Moreover, another striking characteristic of Malaysia's style of argument is that *at no time* has Malaysia provided the *slightest* proof of any Sulu presence *whatsoever* on either Ligitan or Sipadan before 1891:

- In apparently referring to Ligitan and Sipadan (the reasoning is convoluted), Malaysia writes that "in fact these islands were administered by the BNBC and used by Bajaus who transferred their allegiance from the Sultan of Sulu to the BNBC"⁸². This is pure speculation. Furthermore, the references made in the Counter-Memorial to the Memorial ("paras. 5.19, 5.28, 5.31-5.34, 6.5-6.8 & documents there referred to") are deceptive: this supposed proof generally does not concern the islands in dispute but at best relates to Dinawan or Si Amil and in any event *is all post-1891*, as Indonesia established in its Counter-Memorial⁸³ where it was also shown that the Bajau in no way transferred their allegiance from the Sultan of Sulu to the BNBC⁸⁴: the very idea of allegiance was completely alien to them.

⁷⁹ *Ibid.*, paras. 2.10-2.11.

⁸⁰ See para. 5.24, above.

⁸¹ See also ICM, para. 7.18.

⁸² MCM, para. 3.1(c).

⁸³ ICM, paras. 7.16 *et seq.*

⁸⁴ *Ibid.*, paras. 3.23-3.73.

- Similarly, when Malaysia affirms that the Bajau headmen who were established on Dinawan "had the right (confirmed by the Sultan of Sulu) to collect turtle eggs on Sipadan"⁸⁵, it offers no pre-1891 evidence to support this assertion, and provides nothing that does not already appear in its Memorial (see, for example, paragraph 6.9 of Malaysia's Memorial, where Malaysia alleges that "the ownership of the rights was at all material times vested in local Bajaus who acknowledged the authority of the Company. They alone were entitled to collect the eggs". However, no evidence of this assertion is referred to in the subsequent paragraphs). In any event, as Indonesia has shown, the collection of turtle eggs is no proof of the exercise of territorial sovereignty⁸⁶.

5.30 Moreover, even though, in contrast to its Memorial, Malaysia's Counter-Memorial does not stress the Bajau Laut's supposed control over the disputed islands, it nevertheless seriously ignores the nomadic and "non-territory oriented" character of the Bajau. As Clifford Sather puts it:

"Without a territorial base of their own, they were perceived by their neighbours as living outside, and so only tangentially connected to, the system of personal and economic relations in Sulu. Reflecting this status of social and political exclusion, sea-nomadic communities were identified by outsiders by pejorative terms, such as *pala'au* or *luwa'an*, meaning, literally, 'that which is spat or vomited out'"⁸⁷.

5.31 In any case, it is far from true that the Bajau Laut had exclusive links, whatever their nature, with Sulu: "In addition to Sulu, [the 'Dinawan Community's] leadership maintained political connections with Bulungan"⁸⁸. And in 1855 the German ethnographer and Dutch official, Hermann von Dewart, noted that the "Bajaus" in Pulau Panjang (a small island near Tanjung Batu, off the east coast of Kalimantan) "fly a Dutch flag to show that they have surrendered to the 'Company' and the *panggawa* [*penggawa*] has an open letter from the king

⁸⁵ MCM, para. 2.16.

⁸⁶ See ICM, paras. 7.23-7.29.

⁸⁷ *The Bajau Laut*, Oxford University Press, 1997, p. 16.

⁸⁸ *Ibid.*, p. 29.

of Gowa [located on south Sulawesi, then part of the Dutch East Indies], which is used as a kind of passport or recommendation"⁸⁹.

5.32 Malaysia boasts that Indonesia has not been able to demonstrate any effective presence of Boeloengan on the disputed islands, or to prove the formal claims of either the Boeloengan Sultanate or The Netherlands. This is partially true. However, despite Malaysia's numerous assertions to the contrary, the situation is exactly the same for Malaysia. Neither the Sultanate of Sulu, the BNBC in the period 1878-1891, nor the British negotiators during the discussions which led to the conclusion of the 1891 Convention, ever made any reference to either Ligitan or Sipadan. None of the documents furnished by the Parties to the present case, and none of the documents which Indonesia has been able to consult, gives any indication of any act of administration over the disputed islands by either of Malaysia's predecessors in title prior to 1891.

5.33 Moreover, it is certainly not the case that Boeloengan, in contrast to Sulu, was "a small land-based sultanate"⁹⁰ with no maritime connection. Indeed, Boeloengan considered itself as both a land *and* a maritime territory as witnessed, for example, by the very terms of the Contract between the Sultan and the Government of the Netherlands East Indies of 12 November 1850:

"The following islands belong to Boeloengan: Terakkan, Nenoekkan and Sebittik, with the small islands belonging thereto"⁹¹.

5.34 As recognised by Professor Houben in his report, "[t]he composition of Bulungan society was complex. Besides Malays one could find Dayak, Taosug (from the Sulu Archipelago) and Bugis (from South Sulawesi)"⁹², of which the latter two were maritime people *par excellence*. In his well documented book, *The Sulu Zone 1768-1898*⁹³, Dr. James Warren stresses the presence of Bugis and Taosug in Boeloengan and explains the importance of their trade in spices and slaves with Sulu (and Makassar)⁹⁴. Professor Victor T. King also refers to "Bugis merchants who were based on the east coast of Borneo in the Sultanate of

⁸⁹ See *ibid.*, pp. 29-30.

⁹⁰ MCM, para. 3.9.

⁹¹ IM, Vol. 2, Annex 13.

⁹² MCM, Appendix 1, para. 4.7.

⁹³ Singapore University Press, 1981.

⁹⁴ See, for example, pp. 10-13 and 84-87.

Kutei and in the small realms of Berau and Bulungan and who connected up Sulu commerce with the eastern Indonesian spice trade"⁹⁵. And, as is also conceded by Professor Houben, intense "trade relations existed between Bulungan and Bajau people from the Sulu Archipelago [...] Trade with the Bugis existed as well"⁹⁶. Similarly, the 1917 edition of the *Encyclopaedie van Nederlandsch-Indie* indicated that the Bugis "are especially distinguished by their suitability and predilection for the shipping trade, which is even now [...] lively and of importance", and that "[c]enturies ago they were known as good navigators".

5.35 The 1891 Convention put an end to this uncertainty: the 4° 10' N. parallel cut across the rival claims of the parties. This clearly establishes an argument to which Malaysia seems to attach a certain weight but which in reality fully supports Indonesia's position. According to Malaysia, it is significant that at the time of the conclusion of the 1891 Convention the Sultan of Boeloengan only requested that certain rights to land between Broershoek and Batoe Tinagat be preserved, but not the right to collect produce on the islands⁹⁷. Malaysia thus concludes that: "[i]f the Sultan of Bulungan had considered the islands east of Batu Tinagat as within his possessions, he would no doubt have claimed"⁹⁸ this right for his people.

5.36 In reality the Sultan of Boeloengan's request proves two discrete but equally important things:

- Firstly, it establishes that the Sultan clearly considered that he had rights with regard to the territory between Broershoek and Batoe Tinagat, which sits uncomfortably with the Malaysian argument that he had no claims to this area;
- Second, it would indicate that, so far as turtle eggs on Sipadan and Ligitan were concerned, the Sultan had no need to seek the continuation of such rights since they had been preserved to The Netherlands (and the Sultan of Boeloengan) by the 1891 Convention.

⁹⁵ *The Peoples of Borneo*, Blackwell, Oxford, 1993, p. 139.

⁹⁶ MCM, Appendix 1, para. 6.4.

⁹⁷ MCM, paras. 2.17-2.18.

⁹⁸ *Ibid.*, para. 2.18.

Section 4. Conclusion

5.37 At paragraph 3.5 of its Counter-Memorial, Malaysia notes that the Parties agree on one point: "There is no suggestion that any of the islands off the east coast of Borneo were, or were ever treated as, *terra nullius*". This is true, provided that two points are clarified.

5.38 On the one hand, Indonesia took care to point out at several places in its Counter-Memorial⁹⁹, that this was true "at all relevant times", i.e., after 1891. Before that date, the only possible inference that can be drawn from an impartial examination of the situation is that the status of both islands was, at best, uncertain: they were uninhabited, and neither Party has been able to provide any evidence that they were administered by the local rulers before 1891.

5.39 On the other hand, Indonesia can accept that the islands were considered as appertaining to the local coastal Ruler. However, while Malaysia has failed to provide *any* evidence of a pre-1891 Sulu title over them, Indonesia has established that all the territory south of Batoe Tinagat was under the control of Boeloengan. Thus, there is support for the contention that prior to the colonial conquest the disputed islands were not *terrae nullius*, if the situation is considered not from the perspective of contemporary international law, but from that of conceptions of territory existing in that part of the world at that time. As Indonesia showed at length in its Memorial¹⁰⁰ – and not denied by Malaysia, which has failed to make any mention of this important point in its Counter-Memorial – the idea the local rulers had of their relations to territory was very different from that held by European States. This idea entailed consequences in respect of islands located off their mainland territory¹⁰¹: in this area, which comprised hundreds of islands, many of which were uninhabited, the effectiveness of power did not have any particular importance, but it was inconceivable that these islands could be considered to be *res nullius* in the European or contemporary sense of the expression.

⁹⁹ ICM, paras. 2.14, 3.2, 7.3 and 7.9(b).

¹⁰⁰ IM, paras. 4.3, *et seq.*

¹⁰¹ See *ibid.*, paras. 4.18 and 4.39-4.45.

5.40 The general conclusions regarding the pre-1891 situation are thus as follows:

- (a) even if, in view of ideas concerning territory prevalent at that time, Ligitan and Sipadan cannot be considered to be *terrae nullius*, neither Malaysia nor Indonesia have been able to provide any formal evidence that these islands were possessions of the Sultan of Sulu or the Sultan of Boeloengan;
- (b) all the alleged demonstrations of authority on which Malaysia relies took place *after* 1891 and do not concern the disputed islands directly, nor were they made *à titre de souverain*;
- (c) the Bajau Laut were not subject to any durable political control, and their activities cannot bestow a real territorial title on either Party. Moreover, Malaysia has not adduced any evidence that the Bajau Laut had any connection with the islands prior to 1891;
- (d) whilst the BNBC did not carry out any activities south of Semporna before the conclusion of the 1891 Convention, it has been proven (and acknowledged by Malaysia and Professor Houben) that the Dutch were established in Tawau and in the region of the cape of Batoe Tinagat prior to 1891;
- (e) this situation was challenged by Great Britain on the tenuous basis of the 1878 grant, the wording of which, however, would seem to imply that the Sultan of Sulu considered that his territory on the north-east coast of Borneo extended as far as Darvel Bay but not further south. The uncertainty concerning the position of the "Sibuco River" was created entirely *ex post facto* by the British in the framework of their negotiations with the Dutch;
- (f) *in any case, the 1891 Convention was intended to and did remove all ambiguity* in this respect and, as Indonesia has shown in Chapter I of this Reply, the pre-1891 situation is irrelevant for this dispute except in so far as it shows the northward reach of Dutch claims and, generally, the uncertainties regarding the extent of British and Dutch possessions in the area.

CHAPTER VI

THE ABSENCE OF MALAYSIAN SOVEREIGNTY OVER THE ISLANDS BASED ON A CHAIN OF TITLE PASSING FROM SPAIN TO THE UNITED STATES TO GREAT BRITAIN

Section 1. Introduction

6.1 Malaysia's principal claim is that it inherited sovereignty over the islands of Sipadan and Ligitan as a result of a series of international agreements involving Spain, the United States and Great Britain. The foundation for this so-called "treaty title" lies in the following chain of events¹.

- (i) Spain is said to have acquired title to the disputed islands from the Sultan of Sulu on the basis of the 1836 Capitulations and the 1851 Act of Submission.
- (ii) In the 1885 Protocol with Great Britain and Germany, Spain relinquished all title to the Sultan's territories on North Borneo, including islands lying within three marine leagues of the North Borneo coast.
- (iii) While Spain never thereafter claimed sovereignty over all of the islands lying more than three marine leagues from the coast – its claim being restricted to islands which it actually occupied in the Sulu Archipelago – the United States allegedly did advance such a claim after it acquired Spain's territorial possessions under the 1898 and 1900 treaties.
- (iv) Specifically, the United States is said to have claimed both Sipadan and Ligitan in diplomatic correspondence with Great Britain in the early 1900's, by virtue

¹ See generally MCM, para. 3.1.

of the voyage of the *U.S.S. Quiros* in 1903, and by the issuance of a map in the same year².

- (v) Great Britain allegedly acknowledged United States sovereignty over the islands in an Exchange of Notes in 1907, but the BNBC is said to have continued to administer the islands anyway.
- (vi) This situation continued until the conclusion of the 1930 Anglo-American Convention pursuant to which, according to Malaysia's theory, Sipadan and Ligitan were ceded by the United States to Great Britain.

6.2 This chapter will demonstrate that each of these propositions is contradicted by the historical record. Given that there is no evidence that the Sultan of Sulu ever possessed title to Sipadan or Ligitan in the first place³, this chapter will focus on the series of relevant transactions involving Spain, the United States and Great Britain. To assist the Court in identifying the various locations and lines referred to in this chapter, Indonesia has provided a fold-out map following page 130 at the end of this chapter. Indonesia is confident that a review of the evidence before the Court regarding these events supports the following conclusions:

- (i) Malaysia has introduced no evidence showing that Spain considered it had title to either Sipadan or Ligitan. Nor is there any evidence that Spain occupied the islands or carried out any acts of administration on them. While the 1877 and 1885 Protocols provided that Spain could expand its presence in the Sulu Archipelago to islands not yet occupied, this was subject to the condition that it notify Great Britain and Germany accordingly. Spain never did so with respect to Sipadan or Ligitan. It follows that Spain cannot be deemed ever to have acquired sovereignty over the two disputed islands.

² This map is Map 5 in Malaysia's Map Atlas.

³ See Chapter V above and ICM, Chapter III.

- (ii) The fact that Spanish sovereignty did not extend to Sipadan or Ligitan is also evidenced by examining the scope of the territories that Spain relinquished to the United States under the 1898 and 1900 Treaties. These instruments show that the southwesternmost limits of the possessions over which the United States acquired sovereignty were Sibutu Island and its immediate dependencies. These islands are located well to the north and east of Sipadan and Ligitan.
- (iii) Although a United States vessel, the *Quiros*, visited Sipadan in 1903, the United States never claimed sovereignty over the islands. Moreover, the 1903 U.S. map, which tentatively depicted the two islands as falling within U.S. territories and to which Malaysia attaches so much importance, was expressly revoked by the United States later that year and the boundary line depicted on the map was removed from subsequent versions of the map⁴.
- (iv) In 1907, Great Britain and the United States reached an understanding which permitted Great Britain to continue to administer certain islands lying more than three marine leagues from the coast of North Borneo without prejudice to the question of sovereignty. While Malaysia asserts that Sipadan and Ligitan were two of the islands then being administered by the British, there is no evidence to support this contention. To the contrary, correspondence exchanged between the United States and Great Britain shows without any doubt that the islands that were intended to be covered by the 1907 agreement – i.e., that were actually being administered by the British at that time – were the Turtle and Mangsee Islands. These two groups lay well to the north of Sipadan and Ligitan and had nothing to do with them. Nowhere is there any evidence that the 1907 Exchange of Notes was intended to include Sipadan or Ligitan and there was no British "administration" of any kind on these islands at the time.

⁴ See paras. 6.38-6.40, below.

- (v) In the discussions leading up to the 1930 Anglo-American Convention, the United States advanced specific claims to the Turtle and Mangsee Islands, both of which groups lay more than three marine leagues from the North Borneo coast. These islands were ultimately recognised as belonging to the United States in the 1930 Convention. But the United States raised no such claim to Sipadan and Ligitan and the Convention did not cover them. In sum, both islands lay far beyond anything ever claimed by the United States.

6.3 It follows from the above that Spain never had any title to Sipadan or Ligitan which it could have passed on to the United States (*nemo dat quod non habet*). Nor did the United States ever consider itself as possessing sovereignty over the islands. Consequently, there could be no question of the United States "ceding" the islands back to Great Britain in 1930; the 1930 Convention was in no way a treaty of cession. Both Sipadan and Ligitan were Dutch possessions pursuant to the 1891 Convention and the Dutch went so far as to send a naval vessel – the Lynx – to them in 1921 in a physical demonstration of its sovereignty. Nothing that Spain, the United States or Great Britain did in the region ever even remotely displaced that title.

Section 2. Sipadan and Ligitan Did Not Fall Within Spain's Possessions in the Area

A. The 1836 Capitulations and the 1851 Act of Submission

6.4 The Parties agree that the starting point for assessing the extent of Spanish possessions in the Sulu Archipelago lies in the 1836 Capitulations and the 1851 Act of Submission between Spain and the Sultan of Sulu. By the former instrument, Spain acquired seignior and protection over the Sultan's possessions in the Sulu Archipelago⁵. By the latter, Spanish rights ripened into full sovereignty⁶. However, the Parties differ as to the geographic limits of

⁵ IM, Vol. 2, Annex 9.

⁶ MM, Vol. 2, Annex 4.

the possessions thus falling under Spanish control. As a result, it is necessary to revisit briefly both of these instruments.

6.5 In previous submissions, Indonesia pointed out that Article 1 of the 1836 Capitulations defined the extent of Spanish protection provided to the Sultan of Sulu as extending "from the western extremity of Mindanao to Borney [Borneo] and La Paragua [Palawan], with exception of Sandacan and the other territories tributary to the Sultan on the mainland of Borney"⁷. Though loosely worded, an examination of the map of the area shows that this definition could not reasonably have included either Sipadan or Ligitan⁸. Both islands lie well to the south and west of the Sulu Archipelago in its proper sense, particularly bearing in mind that the Spanish rights in the area were defined by reference to the "western point of Mindanao". Moreover, Sipadan and Ligitan could not have formed part of the Sultan of Sulu's Borneo possessions since these were subsequently defined as only encompassing islands falling within three marine leagues of the mainland coast. On the face of it, therefore, the 1836 Capitulations did not cover either Sipadan or Ligitan.

6.6 In the 1851 Act of Submission, Spain acquired sovereignty over "the Island of Sooloo with all its dependencies"⁹. Geographically, neither Sipadan nor Ligitan can be considered to form part of the dependencies of the Island of Sulu which lies over 100 nautical miles to the north and east of Ligitan, the nearest of the two disputed islands. Moreover, Malaysia has introduced no evidence to show that Spain ever deemed Sipadan or Ligitan to fall within its possessions. In Malaysia's own words, Spain was "indifferent" and not interested in either island¹⁰.

B. The 1877 and 1885 Protocols

6.7 The 1877 Protocol was concluded in order to settle difficulties which had grown out of Spanish interference with British and German vessels trading with the Sulu Archipelago. The Protocol accorded to ships of Great Britain and Germany freedom of commerce within the

⁷ IM, Vol. 2, Annex 9.

⁸ See ICM, paras. 6.4-6.5, and Map 6.1.

⁹ See Art. 1 of the 1851 Act of Submission, MM, Vol. 2, Annex 4.

¹⁰ MM, paras. 5.19, 5.20(c) and 5.30.

Sulu Archipelago with respect to islands already occupied and administered by Spain. Article III of the Protocol went on to provide:

"In case Spain should occupy effectively other places in the archipelago of Sulu, and provide thereat the offices and employees necessary to meet the requirements of commerce, the Governments of Great Britain and Germany shall not object to the application of the rules already stipulated for places occupied at present. But, in order to avoid the possibility of new claims due to the uncertainty of business men in regard to the places which are occupied and subject to regulations and tariffs, the Spanish Government shall, whenever a place is occupied in the Sulu archipelago, communicate the fact to the Governments of Great Britain and Germany, and inform commerce at large by means of a notification which shall be published in the official journals of Madrid and Manila"¹¹.

6.8 Prior to the 1877 Protocol, Spain never occupied Sipadan or Ligitan. After 1877, Spain never notified Britain or Germany that it had undertaken a new occupation of either island. It may be concluded, therefore, that Spain did not consider that either of these islands fell within its dominions either before or after the 1877 Protocol. Certainly, Malaysia has introduced nothing in the record to suggest otherwise.

6.9 In its Counter-Memorial, Malaysia claims that, before 1878, a so-called "authoritative" Dutch map of the area showed Sipadan and Ligitan as falling within the dominions of Sulu and hence of Spain¹². This argument is misplaced. The map which Malaysia refers to is a rather rudimentary map first published in 1849 and revised in 1870, well before the 1877 Protocol, the 1878 grant to Dent and Overbeck and the 1891 Convention were concluded. The map actually shows the territories of Boeloengan and Tidoeng, which were under Dutch control, as extending to the *north* of Sebatik Island – i.e., north of the 4° 10' N latitude which was ultimately agreed in the 1891 Convention. Sipadan is labelled on the map, but its geographic location is inaccurately depicted and it is not shown to belong to Sulu. As Indonesia has repeatedly shown, it was precisely in order to remove any ambiguities as to the extent of the respective territories of Boeloengan and Sulu that The Netherlands and Great Britain agreed on the 4° 10' N line as separating their territorial possessions in the 1891 Convention.

¹¹ *Ibid.*, Vol. 2, Annex 5.

¹² MCM, para. 3.1(a), referring to Map 3 in Malaysia's Map Atlas.

6.10 Turning to the 1885 Protocol, in Article I the Governments of Great Britain and Germany recognised Spanish sovereignty "over the places effectively occupied, as well as over those places not yet so occupied [by Spain], of the Archipelago of Sulu (Jolo)". Article II, in turn, repeated the formula that had appeared in the 1836 Capitulations – namely, that the Sulu Archipelago:

"comprises all the islands which are found between the western extremity of the island of Mindanao on the one side and the continent of Borneo and the Island of Paragua [Palawan] on the other side, with the exception of those which are indicated in Article III"¹³.

In Article III, Spain relinquished in favour of Great Britain all claims of sovereignty over the territories of Borneo which then belonged, or had belonged in the past, to the Sultan of Sulu and which comprised the islands of Balambangan, Banguey and Malawali as well as other islands that were administered by the BNBC falling within three marine leagues of the coast. Article IV then went on to repeat the provisions appearing in the 1877 Protocol to the effect that if Spain were to occupy other islands in the archipelago, it would inform Great Britain and Germany who, presumably, would then recognise Spanish sovereignty over such islands.

6.11 As previously indicated, Spain never occupied Sipadan or Ligitan and thus no notification was ever issued. The circumstances both before and after the conclusion of the 1885 Protocol thus confirm that Spain did not possess sovereignty over either of the disputed islands at the time.

6.12 Despite the clear terms of the 1885 Protocol, Malaysia argues that there was a distinction between the Sulu Archipelago as a geographical entity and the extent of the dominions of Sulu. In Malaysia's words:

¹³

MM, Vol. 2, Annex 15.

"The fact that the Sultan did not grant islands beyond 3 marine leagues to the BNBC did not mean that he did not claim or own those islands, or that the islands were part of the Sulu Archipelago in the geographical sense"¹⁴.

Malaysia goes on to suggest that there could have been other islands situated more than three marine leagues (nine miles) from the coast of North Borneo, such as Dinawan, which no one considered to be part of the Sulu Archipelago in the geographic sense¹⁵.

6.13 Malaysia's argument misses the point. Undoubtedly, there were islands situated more than nine miles from the coast which were not granted to the BNBC pursuant to the 1878 grant to Dent and Overbeck or the 1885 Protocol. Dinawan may have been one of these; Sipadan and Ligitan were others. But that does not mean that these islands belonged to the Sultan of Sulu. What is important is the fact that Spain never considered that it had title to these islands as part of the possessions it acquired from the Sultan of Sulu, and neither did the United States, as shall be presently seen. Nonetheless, to the extent that there were uncertainties as to the respective limits of the possessions which had been granted to the BNBC and those acquired by The Netherlands, the 1891 Convention settled these issues once and for all. It adopted the 4° 10' N parallel of latitude as a practical compromise separating each side's territorial possessions.

6.14 In the light of the relevant treaty instruments, there are no grounds for Malaysia's assertion that Sipadan and Ligitan formed part of Spain's possessions prior to the Spanish-American War. Not once did Spain claim or even suggest that the islands belonged to it. Nor did the Sultan of Sulu express any interest over them. An essential link in Malaysia's alleged chain of title is thus missing. As Malaysia itself concedes, "Evidently if Spain had no rights over Sipadan and Ligitan in 1898, there was nothing it could have transferred to the United States by the Treaties of 1898 and 1900"¹⁶.

¹⁴ MCM, para. 3.12.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, para. 3.17.

Section 3. The United States Did Not Consider that it Had Sovereignty over Sipadan or Ligitan

A. The 1898 and 1900 Spanish-U.S. Treaties

6.15 With respect to the 1898 Treaty, the Parties are in complete agreement¹⁷. This agreement identified the southern limit of the Spanish possessions acquired by the United States as falling along the 4° 45' N parallel of latitude. Clearly, as can be seen on Map 10 at the end of this chapter, this limit was well to the north of Sipadan and Ligitan and thus excluded them.

6.16 However, the Parties differ as to the scope of the 1900 Treaty. That Treaty extended the geographic scope of the 1898 Treaty so as to include amongst the islands relinquished by Spain "any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that [the 1898] Treaty and particularly to the islands of Cagayan Sulu and Sibutu and their dependencies"¹⁸.

6.17 Indonesia's position is that, according to the plain and ordinary meaning of the 1900 Treaty, the southern limit of U.S. possessions acquired from Spain included Sibutu and its dependencies, but not Sipadan or Ligitan which lay much further south and west and which were not part of the Philippine Archipelago. Certainly on geographic grounds, neither Sipadan nor Ligitan can be considered as constituting dependencies of Sibutu, and Malaysia, quite correctly, does not argue as much.

6.18 Malaysia's position appears to be that the language of the 1900 Treaty – "particularly to the islands of Cagayan Sulu and Sibutu and their dependencies" – was broad enough so as to include other islands, not named in the Treaty, within the rubric of its terms. Malaysia cites

¹⁷ ICM, para. 6.16; MCM, para. 3.19.

¹⁸ IM, Vol. 3, Annex 94.

as an example the Turtle Islands, which were being administered by the BNBC in 1900, but which were not mentioned by name in the Treaty¹⁹.

6.19 Malaysia's reference to the Turtle Islands is particularly appropriate. Geographically, the Turtle Islands lay in the vicinity of the island of Cagayan Sulu and thus could have been considered to be dependencies of that island. More important, however, is the fact that the United States subsequently did claim title to the Turtle Islands – a claim which was recognised as valid by Great Britain in the 1930 Convention. At the same time, the United States did not similarly claim Sipadan or Ligitan which lay to the south of any U.S. interests in the area. This difference in conduct reinforces the fundamental distinction that the United States drew between islands lying to the north of Sibutu and those lying to the south. With respect to the former, the United States raised specific claims wherever the islands in question lay more than three marine leagues from the mainland coast. But with respect to the latter, the United States raised no such claims because they lay beyond the territories that the United States considered it had inherited from Spain.

6.20 There is an important piece of evidence which corroborates this conclusion but which has been ignored by Malaysia. This is the letter of 23 October 1903 from the U.S. Secretary of State to the Secretary of War. In relevant part, it read:

"The treaty of Nov. 7, 1900, by expressly including the Island of Sibutu may have intended such inclusion as exceptional *and as a limit to the claims of Spanish dominion to the southwest of the Sulu group*"²⁰.

6.21 As will be seen, it was because the State Department viewed Sibutu and its dependencies as the limit of Spanish possessions in the area that (i) the United States never claimed sovereignty over Sipadan or Ligitan; (ii) maps showing U.S. possessions extending to these two islands were ordered to be withdrawn; (iii) the question of sovereignty over Sipadan and Ligitan never arose in the discussions between the United States and Great

¹⁹ MCM, para. 3.19.

²⁰ IM, Vol. 3, Annex 104. Emphasis added.

Britain leading up to the 1930 Anglo-American Convention; and (iv) the ultimate boundary line agreed in that Convention did not extend south of Sibutu and its dependencies.

B. The Events of 1903

6.22 According to Malaysia, 1903 was an important year in the development of the United States' position. The problem is that Malaysia has only told half of the story. Many important documents and maps dating from 1903, which fundamentally contradict Malaysia's thesis, are simply ignored or miscited thus producing a decidedly misleading picture of events.

6.23 To give a sample of the difficulties created by Malaysia's selective treatment of the evidence, the following may be mentioned:

- (i) Malaysia fails to point out that the U.S. State Department, which was responsible for boundary issues affecting the Philippines, did not concur with the Navy Department's earlier view that the United States possessed sovereignty over *all* islands lying more than three marine leagues from the coast of North Borneo, including those lying south of Sibutu Island and its dependencies. The State Department's view was very different in maintaining that effectively U.S. possessions were limited in the south to Sibutu and its dependencies.
- (ii) The State Department did not endorse the voyage in 1903 of the *Quiros* and did not claim sovereignty over Sipadan or Ligitan as a result of this voyage.
- (iii) The boundary line on the 1903 U.S. map (H.O. Chart 2117), repeatedly relied on by Malaysia as showing the disputed islands as U.S. possessions, was revoked on the express orders of the State Department later in 1903. The map was subsequently reissued without the boundary line, a fact which Malaysia studiously ignores.

- (iv) Instead, other maps, left unmentioned by Malaysia, were issued by the United States showing that the United States had no claim as far south as Sipadan and Ligitan.

6.24 It is undisputed that the State Department had the final say in deciding which islands the United States laid claim to²¹. On 3 April 1903, the Secretary of State wrote a letter to the Secretary of the Navy in which Sibutu was clearly identified as constituting "the most southwesterly of the Sulu Group proper"²². Malaysia contends that the Secretary of State made a distinction between "the whole of the Sulu Archipelago" and "the Sulu Group proper... The main Archipelago" when he wrote this letter²³. Though not specifically stated, the implication of this argument is that Sipadan and Ligitan might somehow have been considered to form part of "the whole of the Sulu Archipelago" in its broad sense, and thus not excluded from the scope of the 1900 Treaty, even though they were not part of "the Sulu Group proper".

6.25 In the first place, Malaysia miscites the letter. Malaysia claims that the Secretary of State agreed with the Secretary of the Navy's view that "the sovereignty of the United States covers *all* outlying islands, islets and reefs that lie more than three marine leagues from the coast of British North Borneo, except the islands of Balambangan, Banguay and Malawali"²⁴. But this is not what the letter says. In reciting the words quoted above, the Secretary of State was reflecting the position of the Secretary of the Navy, *not* the State Department's own position. Malaysia simply omits the preceding line of the letter in which the Secretary of State says that "it is your [i.e., the Secretary of the Navy's] understanding that the sovereignty of the United States covers...".

6.26 In point of fact, the State Department's views were very different. Far from concurring that the sovereignty of the United States extended to *all* islands lying more than three marine leagues from the coast of British North Borneo, the Secretary of State indicated that U.S.

²¹ See, for example, letter from Major E.R. Hills, War Department to the Commanding General, Division of the Philippines dated 12 May 1903. Annex 6 to this Reply.

²² IM, Vol. 3, Annex 98, p. 2 of the letter.

²³ MCM, para. 3.20.

²⁴ *Ibid.*, para. 3.20, citing from the Secretary of State's Letter of 3 April 1903 to the Secretary of the Navy. Emphasis added.

sovereignty extended to "the whole of the *Sulu Archipelago* up to three marine leagues of the mainland coasts of British North Borneo"²⁵. It is in this context that the letter concludes:

"The Protocol of 1885 between the same Powers (a) expressly recognized the sovereignty of Spain over all parts of the Sulú Archipelago then or thereafter to be effectively occupied by Spain; (b) defined the limits of the Archipelago as extending from Mindanao to Borneo and Palawan and including Balabac and Cagayan-Joló"²⁶.

Hence it was acknowledged by the Secretary of State that Spain had only exercised sovereignty over territories within the Sulu Archipelago as defined in (b) *and* which had been effectively occupied by Spain, neither of which conditions applied with respect to Sipadan and Ligitan.

6.27 This difference – the emphasis on the "Sulu Archipelago" as opposed to "all islands" – is important for a proper understanding of the United States' position. Subsequent documents reveal unequivocally that the State Department did not accept the view that the Sulu Archipelago extended as far south as Sipadan and Ligitan. As already noted, the Secretary of State's position was that Sibutu Island and its dependencies represented the southwesternmost limit to United States possessions in the region.

6.28 Malaysia asserts that it was on the basis of the 3 April letter that the U.S. Navy's Hydrographic Office prepared in June 1903 a map labelled "Northern Shore of Sibuko Bay". This map appeared to show Dinawan, Si Amil, Ligitan and Sipadan as "under the sovereignty of the United States of America"²⁷. Not surprisingly, the map commands a special place in Malaysia's case. It is repeatedly referred to both in Malaysia's Memorial and its Counter-Memorial to support the proposition that the United States claimed sovereignty over Sipadan and Ligitan in 1903. But the facts are otherwise.

6.29 First of all, Malaysia is confused as to the source of the map. At paragraph 5.25 of its Memorial, Malaysia states: "In 1903, in response to a direction from the Secretary of the Navy, the United States Hydrographic Office published a chart of the 'Northern Shore of

²⁵ *Ibid.* Emphasis added.

²⁶ IM, Vol. 3, Annex 98, p. 15 of the letter.

²⁷ MCM, para. 3.20.

Sibuko Bay". However, the document referred to as authority for this statement is actually a memorandum drafted by the Acting Hydrographer of the U.S. Navy dated 8 August 1903²⁸. It states:

"In accordance with instructions from the Chief of Bureau of Equipment, the following method will be observed in delineating the S.W. boundary of the United States possessions in the Philippines for the Commissioner of the General Land Office: -

The line will follow the "boundary line" as laid down on Hydrographic Office charts Nos. 2116, 2117, 2118, 2119, 2121, 2122, and 1709...".

6.30 On the bottom right hand corner of the June 1903 map, which is reproduced for convenience facing this page, it can be seen that it is in fact H.O. Chart No. 2117, one of the maps to be used as guidance according to the 8 August 1903 memorandum, and not the consequence or "response" to this memorandum as Malaysia maintains.

6.31 Malaysia has thus failed to explain the true origin of the June 1903 map. The memorandum in question cited by Malaysia appears to have resulted in the placing of various boundary lines on a quite different map, but that map has not been produced.

6.32 While Malaysia thus gets off on the wrong foot, it is only afterwards that Malaysia's version of events completely breaks down. For Malaysia has failed to point out that, on 20 October 1903, the Acting Secretary of War forwarded to the Secretary of State the map that appears to have been prepared using H.O. Chart 2117 as "guidance" and asked the State Department to confirm that the boundary line depicted on the map was the correct line²⁹. The Secretary of State replied by letter dated 23 October 1903 to which reference has already been made. Despite the fact that Indonesia drew attention to this letter in its Memorial and annexed a copy thereto³⁰, Malaysia failed to address the point in its Counter-Memorial. Regrettably, therefore, it is necessary to recall what the Secretary of State had to say about the matter.

²⁸ MM, Vol. 3, Annex 62.

²⁹ A copy of this letter is attached as Annex 8. Although it bears the date of 23 October 1903, from the Secretary of State's response it appears that the letter was actually dated 20 October 1903.

³⁰ See IM, Vol. 3, Annex 104.

6.33 After referring back to his letter of 3 April 1903, the Secretary of State offered the following remarks:

"This department did not undertake to trace the line demarking the respective jurisdictions of Great Britain and Spain, to which latter the United States has succeeded *in toto*. We are not in a position to apply on the charts the line described in general terms by the conventions entered into by Spain and Great Britain and Germany. Any line drawn by either part in interest for itself alone would necessarily be tentative unless assented to by the other party".

The Secretary continued:

"Under these circumstances this department is unable to either confirm or alter the line drawn *ex parte* upon the chart you have received from the Hydrographic Office of the Navy Department".

6.34 From this it can be seen that the drawing of boundary lines such as those appearing on the June 1903 map relied on by Malaysia was not endorsed by the U.S. State Department. The Secretary went so far as to add the following highly pertinent observation:

"The prolongation of the red tracing from the eastward of Sibutu to and around Sipadan Island and thence northwardly to Darvel Bay would probably require to be supported by evidence that Sipadan and the included keys and rocks had been recognised as lying within the dominions of Sulu described in the conventions between Spain on the one hand and Great Britain and Germany on the other. This is a question of fact which the department of state has no means of determining and considering which an opinion would be mainly *ex parte*".

6.35 Following these remarks, the Secretary referred to the fact, discussed at paragraph 6.20, above, that under the 1900 Treaty the island of Sibutu was probably intended as the southwesternmost limit of Spanish dominions in the Sulu group. It is perfectly understandable that this determination influenced the Secretary's decision that U.S. maps of the area *should not include* any boundary line around Sipadan and Ligitan. Instead, the Secretary ordered that all such lines be deleted from the maps and replaced with a caption simply making reference to the 1900 Treaty.

6.36 Following receipt of the 23 October 1903 letter, the Secretary of the Navy informed the Commander of the U.S. Asiatic Fleet that the Hydrographic Office had been instructed to delete the boundary line from charts of the region³¹.

6.37 In fact, the record shows that H.O. Chart 2117 was only issued pending approval by the State Department and never actually published. The first endorsement of the Secretary of State's 3 April letter to the Secretary of the Navy indicates that the Bureau of Equipment sent the chart to the Navy Department, stating:

"The Bureau forwards herewith seven charts (H.O. Nos. 1709, 2116, 2117, 2118, 2119, 2121, and 2122) upon which are drawn lines showing the boundary between the possessions of the United States and those of British North Borneo as set forth, according to its interpretation, in the accompanying letter from the State Department. If these lines are pronounced correct, the Bureau will have the charts published with the boundaries in accordance with instructions of the Department"³².

6.38 As the sixth endorsement confirms, on 25 November 1903 the letter and maps (including H.O. Chart 2117) were:

"Respectfully returned to the Bureau of Equipment inviting attention to the correspondence between the Secretary of State and the Acting Secretary of War, which was referred to the Bureau of Equipment on October 24, 1903.

2. The Department accordingly directs that, for the present, the boundary line be omitted from the charts; and that a note be printed, either in the general legend of the chart or in brackets, in situ, reading:

'By a treaty signed November 7, 1900, Spain relinquished to the United States all title to islands belonging to the Philippine Archipelago and lying outside of the lines described in the Treaty of Peace of December 10, 1898; and in particular to Cagayan-Sulu and Sibutu and their dependencies'"³³.

6.39 Malaysia's pleadings fail to point out this important development. To set the record straight, Indonesia has attached a copy of the original version of Chart 2117 introduced by Malaysia and the reissued version of the map which Malaysia neglects. Both maps appear on

³¹ Letter of 31 December 1903, Annex 9 to this Reply.

³² The letter and endorsements are at Annex 5 to this Reply.

³³ *Ibid.*

the fold-out opposite page 116. As can be seen from the caption in the bottom right corner of the reissued map, it was the "second edition" of the map. No longer did the map indicate that U.S. possessions included Sipadan and Ligitan. Instead, there was a reference at the bottom of the map to the 1900 Treaty as had been suggested by the Secretary of State. From this it can be seen that Malaysia's assertion that "whatever definition might be given to the 'Sulu Archipelago', the United States did in fact claim all these islands, as the 1903 map shows" is demonstrably wrong³⁴.

6.40 Nor does Malaysia disclose the fact that the map that was prepared pursuant to the memorandum of 8 August 1903 was also reissued. It will be recalled that Malaysia misidentified this map as the original H.O. Chart 2117. This is incorrect. The actual map was H.O. Chart 529, a copy of which appears overleaf³⁵. As can be seen from the legend at the top of the map, it included various boundary limits including those resulting from the 8 August 1903 memorandum. Significantly, none of the proposed boundary lines extended south of Sibutu so as to encompass the islands of Sipadan and Ligitan.

6.41 It is in the light of these developments that the voyage by the *U.S.S. Quiros* in the summer of 1903 needs to be considered. The Department of the Navy was unsure of either the nature or extent of the territorial possessions that it had acquired from Spain, and the voyage of the *Quiros* can be best described as a fact-finding mission. Clearly, Lieutenant Boughter did make various comments regarding what he considered the extent of U.S. sovereignty in the area, but Malaysia provides no indications that this lay within his mandate. The fact that only a few months later the U.S. Secretary of State expressly rejected a "boundary line" that encompassed Sipadan and Ligitan clearly undermines any views that Lieutenant Boughter may have had.

6.42 What cannot be disputed is that the United States never relied on the voyage of the *Quiros* to support a claim to Sipadan and Ligitan. It would have been perfectly possible for

³⁴ MCM, para. 3.20 (footnotes omitted).

³⁵ This map bears an endorsement dated 1926 from the Library of Congress thus reflecting the fact that the map was considered by the United States accurately to reflect its position well after the events of 1903.

the Secretary of State to have formulated a claim to the islands based on the *Quiros*' visit. But he did not do so³⁶. Instead, the Secretary of State ordered the earlier version of Chart 2117 showing Sipadan and Ligitan as U.S. possessions to be withdrawn and a new map to be issued. The United States' consistent position was that U.S. possessions in the southernmost reaches of the Sulu Archipelago did not extend beyond Sibutu and its dependencies. No claim to Sipadan or Ligitan was made to Great Britain either in 1903, or in 1907 when a temporary understanding was reached between the two parties, or even in the discussions leading up to the 1930 Convention. For all intents and purposes, the activities of the *Quiros* were completely irrelevant as far as Sipadan and Ligitan were concerned. They certainly cannot be relied on, as Malaysia does, to support the proposition that there was "a vigorous assertion of legal title on the part of the United States"³⁷.

6.43 There is one further issue raised by Malaysia regarding the activities of the *Quiros* which needs to be corrected. In its Memorial, Malaysia drew attention to the fact that on 13 July 1903, the Chairman of the BNBC wrote to the Foreign Office protesting against the actions of the *Quiros*³⁸. That letter suggested that, if pressed on the issue by the Foreign Office, the U.S. Government would readily agree to instruct its local officials to remove the flags and tablets they had placed on the islands. Malaysia then asserts that Sipadan and Ligitan were amongst the islands referred to in the BNBC's letter³⁹. Based on this line of argument, Malaysia jumps to the following conclusion in its Counter-Memorial:

"But of course the BNBC was informed about the visit to the islands around Darvel Bay, *including Sipadan*, and protested those as well"⁴⁰.

6.44 This contention once again seriously misrepresents the facts. The 13 July 1903 letter did not list the islands to which the BNBC's protest was directed. Instead, it referred back to a

³⁶ Further evidence showing that the United States did not draw any conclusion with respect to sovereignty as a result of the voyage of the *Quiros* may be found in letters dated 11 March 1904 and 24 April 1904 from the Navy Department and the United States Asiatic Fleet, respectively, in which instructions were explicitly given not to claim sovereignty over any of the islands lying off the coast of Borneo. The letters are at IM, Vol. 3, Annexes 107 and 108.

³⁷ MCM, para. 3.22.

³⁸ See MM, paras. 5.31 and Vol. 3, Annex 59.

³⁹ *Ibid.*, para. 5.32.

⁴⁰ MCM, para. 3.23. Emphasis added.

dispatch of 22 June 1903 regarding the American occupation of "certain islets". Unfortunately, Malaysia did not annex this document. However, Indonesia has located the document in question and has attached it as Annex 7 to this Reply. It is a very short document from Governor Birch to the BNBC which reads as follows:

"American man-of-war paid a visit to the Islands of Bakungan, Taganac, Lankayan, Sibaung, Libiman, and fixed tablets and flags. I am advised by letter to proceed to the east coast. Prompt action is imperative".

6.45 As can be seen, there is no mention of any protest concerning the *Quiros*' actions on Sipadan or around Ligitan, and Malaysia is wrong to suggest otherwise. Moreover, Indonesia is constrained to point out that the *Quiros* did not even visit Sipadan until 22 July 1903, *after* both the 22 June and 13 July letters had been written⁴¹. To suggest that BNBC officials were protesting about a visit which had not even taken place shows a remarkable degree of prescience on their part.

6.46 In short, there is no evidence of any protest either by the BNBC or the British Government of the action of the *Quiros* around Sipadan and Ligitan. Nor has Malaysia produced any evidence to support the further allegation that "the fact of the BNBC's actual possession of the islands was disputed neither by Great Britain nor the United States"⁴². Quite simply, there was no BNBC "actual possession" of the islands at the time so there was nothing to protest.

C. The 1907 Exchange of Notes

6.47 Malaysia's Counter-Memorial criticises Indonesia for having relatively little to say about the 1907 Exchange of Notes between the United States and Great Britain⁴³. In truth, the Exchange is of limited relevance to this case. As Indonesia will presently explain, far from supporting Malaysia's claim that the BNBC was administering Sipadan and Ligitan at the time⁴⁴, the evidence shows the contrary. The Exchange of Notes had nothing to do with

⁴¹ IM, Vol. 3, Annex 101, at p. 363.

⁴² MCM, para. 3.23.

⁴³ *Ibid.*, para. 3.24.

⁴⁴ *Ibid.*

Sipadan or Ligitan. It concerned the Turtle Islands and the Mangsee Islands lying far to the north.

6.48 With respect to the question of BNBC "administration" over the disputed islands, Malaysia engages in a classic bootstrap argument. Malaysia has been unable to produce any evidence that prior to 1907 the BNBC had carried out administrative activities on Sipadan or Ligitan. Malaysia thus seizes on the 1907 Exchange and its annexed map to suggest that the Exchange itself is evidence of such administration. But the 1907 Exchange did not indicate that the United States considered itself to be the rightful owner of Sipadan and Ligitan.

6.49 Proof of which islands the United States and Great Britain considered were covered by the administrative arrangements of 1907 is provided by correspondence between the two countries exchanged in connection with the conclusion of the subsequent 1930 Convention. The 1907 agreement recognised that a formal delimitation of each side's territorial possessions was to be deferred for subsequent consideration. On 11 April 1927, the division of Far Eastern Affairs of the State Department sent a letter to the Secretary of State in which the United States' view of the scope of the 1907 Exchange was made clear. The letter stated:

"In 1907 a temporary agreement was reached between the United States and Great Britain by which the administration of certain islands (*known as the Turtle Islands Group*) located near the north coast of British North Borneo, was left in the hands of British North Borneo Company until the respective governments, by treaty, delimited the boundaries between their respective domains, or until the expiration of one year from the date of a notice of termination. This agreement was made because the United States was not at the time of its conclusion in a position to administer the islands in question"⁴⁵.

6.50 Enclosed with this letter was a similar letter from Frank Kellogg to the President of the United States⁴⁶. Both letters made it clear that the islands which had been the subject of the 1907 Agreement were the Turtle Islands which were then being administered by the BNBC. Nowhere was there any suggestion that the 1907 Agreement concerned Sipadan and Ligitan.

⁴⁵ Annex 13 to this Reply. Emphasis added.

⁴⁶ *Ibid.*

6.51 Great Britain adhered to the same view. This can be seen from the letter sent by the British Ambassador in Washington to the Secretary of State on 2 January 1930 forming part of the Exchange of Notes regarding the continued administration of the islands in question by the BNBC. It provided:

"By the convention concluded between the President of the United States of America and His Britannic Majesty for the purpose of delimiting the boundary between the Philippine Archipelago on the one hand and the State of North Borneo which is under British protection on the other hand, the sovereignty over certain islands which have for many years past been administered by the British North Borneo Company has been definitely recognised as pertaining to the United States of America. *These islands which formed the subject of the arrangement effected by an exchange of notes between His Majesty's Government and the United States Government on the 3rd and 10th July 1907, are –*

1. Sibaung, Boaan, Lihiman, Langaan, Great Bakkungaan, Taganak, and Baguan in the group of islands known as the Turtle Islands.
2. The Mangsee Islands"⁴⁷.

6.52 Thus, there was agreement by both U.S. and British officials that the subject matter of the 1907 Exchange concerned the Turtle Islands and the Mangsee Islands. Sipadan and Ligitan were not mentioned because there had been no British administration of these islands in 1907 nor any British or American claims to them. The fact that the red line appearing on the map attached to the 1907 Exchange extended to the 4° N parallel of latitude was purely arbitrary and undoubtedly put forward for convenience only. But it in no way created a British administration over the islands that are in dispute in this case where none previously existed. And it certainly did not show, as Malaysia asserts, "that the affected islands were administered by the BNBC"⁴⁸. Not only was the Exchange not published at the time it was entered into, but even if it had been, there would have been no need for a Dutch protest because it did not concern either Sipadan or Ligitan. As has been seen, the Dutch in any event sent a naval vessel to Sipadan and Ligitan in 1921 in a physical display of Dutch sovereignty over the islands⁴⁹.

⁴⁷ Annex 20 to this Reply. Emphasis added.

⁴⁸ MCM, para. 3.24.

⁴⁹ See Chapter III, Section 1, above.

D. The Effects of the 1930 Anglo-American Convention

6.53 The final link in Malaysia's claimed chain of title is the 1930 Convention. Malaysia treats this Convention as if it affected a cession of Sipadan and Ligitan by the United States to Great Britain. But none of the evidence produced in this case even so much as hints that the United States considered that it was ceding anything to Great Britain. Rather, the documentary record shows in the clearest possible terms that the United States only deemed that it had title to islands lying more than three marine leagues from the North Borneo coast in areas lying to the north of Sibutu and its immediate dependencies. As a result, the negotiations between the United States and Great Britain leading up to the conclusion of the 1930 Convention focused solely on the status of the Turtle Islands and the Mangsee Islands.

6.54 Malaysia is forced to concede, as it must, that the southern limits of the boundary fixed by the 1930 Convention lay well to the north of the 4° 10' N latitude and thus well to the north of Sipadan and Ligitan⁵⁰. However, Malaysia invites the Court to read the Convention against the background of the 1903 map and the 1907 Exchange of Notes⁵¹.

6.55 Indonesia has already explained how Malaysia's continued reliance on the 1903 map, as well as the 1907 Exchange, is misplaced. The 1903 map was withdrawn and replaced by maps which either showed no boundary at all encompassing Sipadan and Ligitan or which showed a line which depicted the extent of U.S. territories as lying well to the north. For example, as late as 1926 one may find in the United States records a copy of a map – Hydrographic Office Chart No. 529 – which placed the limit of U.S. possessions along a red line falling three marine leagues from the North Borneo coast well to the north of the two disputed islands. A copy of this map appears facing page 120. Moreover, the 1907 Exchange of Notes had nothing to do with Sipadan and Ligitan as has already been explained. Coupled with the State Department's earlier view that the southwesternmost limit of the possessions acquired from Spain only went as far as Sibutu and its dependencies, this explains

⁵⁰ MCM, para. 3.25.

⁵¹ *Ibid.*

why the southwestern limits of the boundary established by the 1930 Convention did not extend to Sipadan and Ligitan.

6.56 Malaysia goes on to argue that the reason why the boundary line stopped at this point was "because there were no islands the United States wished to retain which fell south or west of the 1930 line"⁵². There is no evidence to support this remarkable assertion. Nowhere, either in the Convention itself or in the *travaux préparatoires*, is there any indication that the United States considered that there were islands to which it had a valid claim which it did not wish to retain. It was not as if the 1930 Convention was a compromise with the United States acquiring the Turtle and Mangsee Islands in return for Sipadan and Ligitan. The evidence shows that the British Government never doubted for a moment the right of the United States to the Turtle and Mangsee Islands. The only question that the British Government put forward on behalf of the BNBC was whether the BNBC could continue to administer certain islands in the Turtle Islands group.

6.57 The 1907 arrangement continued to the satisfaction of both the British and U.S. Governments until around 1922, when the U.S. Government, under pressure from the increasingly nationalistic Philippines, indicated that it wished to assume administration over some islands falling to the west of the "Durand line"⁵³. Senator Frank B. Kellogg of the U.S. Department of State later wrote to Sir Esme Howard, the British Ambassador to the United States on 21 April 1925:

"Since it is the desire of this Government to assume at present administration over only the seven islands mentioned in Mr. Lockhart's letter of September 20, 1922, to Mr. Peterson, namely: Boaan, Lihiman, Langaan, Great Bakkungaan, Little Bakkungaan, Taganac and Baguan [*i.e.* the Turtle Islands Group] it would seem preferable to provide for this by a modification of the existing agreement [...]"⁵⁴.

⁵² *Ibid.*

⁵³ See Foreign Office Memorandum dated 13 July 1929 at Annex 16, which states:

"No developments of any particular interest occurred in this matter until 1922, a year in which there was considerable agitation for Philippine independence, which was accompanied by a desire on the part of the Filipinos for the return to the United States, or rather to Philippine jurisdiction, of certain of the islands in dispute. In the same year the United States Government pressed diplomatically for the surrender of seven islands, known locally as the Turtle Islands group".

⁵⁴ Annex 12 to this Reply.

6.58 The preferable solution to the issue subsequently appeared to be to settle a final boundary agreement. Hence Senator Frank B. Kellogg's letter to Sir Esme Howard of 20 August 1927:

"[...] it would be preferable that an agreement be concluded between the United States and Great Britain definitely determining the boundary[...]

The United States is prepared to agree that the boundary between the Philippine Archipelago and British North Borneo be as indicated in red ink on the accompanying charts (Nos. 4707 and 4720, published by the United States and Geodetic Survey) [...]"⁵⁵.

A copy of Chart 4707 is at Annex 17 to this Reply (Chart 4720 dealt with the northern sector). It can be seen from the chart that Sipadan and Ligitan, which were not even covered by the chart, were not included within the terms of reference of this agreement for the simple reason that the United States did not consider that they fell within its possessions.

6.59 As to the position of the boundary line proposed in the 1927 letter, Senator Kellogg explained as follows:

"It will be observed that the boundary now proposed by the United States lies farther from Borneo than does the 'Durand Line', except in the vicinity of the Turtle Islands, and in the portion of the 119th meridian where the two lines coincide.

With respect to the statement in your note under reference, that the British North Borneo Company has a good claim to Great Bakkungaan and Little Bakkungaan Islands, it will be observed that the boundary above described places Little Bakkungaan Island on the British side of the line. With respect to the desire of your Government to obtain for the British North Borneo Company a lease of an area on Taganac Island and certain privileges to insure the operation of the lighthouse now operated by the company on that island, you are informed that the Philippine Government is prepared to take over and maintain the lighthouse, and negotiations to that end would form part of the negotiations looking to the conclusion of the proposed treaty"⁵⁶.

6.60 The BNBC raised no objections to the 1927 U.S. proposal⁵⁷. However, it did make a plea that the Turtle and Mangsee Islands should remain under the administrative control of the

⁵⁵ Annex 14 to this Reply.

⁵⁶ *Ibid.*

⁵⁷ See Memorandum on North Borneo Philippines Boundary at Annex 19.

North Borneo Government, noting the administrative difficulties that would be faced by the Philippines Government if the latter were to assume control over them⁵⁸. The BNBC memorandum dealing with this issue concluded:

"Finally, the British North Borneo Company submit that it might be possible to persuade the United States Government to adopt a generous view of the matter and either cede these islands to North Borneo or at any rate allow them to remain for a further indefinite period under the jurisdiction of North Borneo; any such cession would naturally be subject to such financial and other terms and conditions as may be agreed".

6.61 This proposal (that the Turtle and Mangsee Islands should be ceded to Britain) was re-stated in a letter from Governor Humphreys to the BNBC President dated 4 February 1929, with an attached memorandum listing the reasons supporting the BNBC's argument⁵⁹, and was referred to in the subsequent Foreign Office memorandum dated 13 July 1929. This memorandum reads:

"While the British North Borneo Company agree that they had no legal title to the Turtle Islands, they hope, for reasons which they fully explain in their memorandum, that the United States Government would permit the Turtle Islands to remain under the jurisdiction of the British North Borneo Company. The Company made no offer in their memorandum to give consideration for this concession on the part of the United States Government, but it is understood that they will be prepared to give some pecuniary compensation if they are permitted to remain in possession of the Turtle Islands"⁶⁰.

6.62 However, as explained in the letter dated 6 August 1929 from Sir Esme Howard to Arthur Henderson M.P., the United States Government was under considerable political pressure from the U.S. Senate and from the Philippine Government not to relinquish any territorial possessions in favour of British North Borneo:

"As regards the proposals in the memorandum the American representatives, while admitting that administration of the islands was easier from Sandakan than from Manila, took that view that cession or sale, and even lease of the islands to North Borneo would present insurmountable difficulties owing to the attitude in such matters

⁵⁸ *Ibid.*

⁵⁹ Annex 15 to this Reply.

⁶⁰ Annex 16 to this Reply, at p. 198.

of the United States Senate, and also, they led us to believe, to opposition on the part of the Philippine Government"⁶¹.

6.63 As a result of these "insurmountable difficulties", the 1930 Convention left the Turtle and Mangsee Islands to the United States side of the boundary line, and a supplementary Exchange of Notes was used to provide for the continued administration of the islands in question by the BNBC.

6.64 The above analysis demonstrates that from as far back as 1922 the U.S. State Department was under increasing pressure from the Philippine Government to assume administration of islands falling within the territorial limits of the Philippines, to the maximum extent possible, and from both the Philippine Government and the U.S. Senate not to cede or even lease territories that were being administered by the BNBC to Great Britain.

6.65 As a result of this pressure, the United States refused to cede, sell or lease the Turtle and Mangsee Islands to Britain, and consequently it is untenable for Malaysia to suggest that the United States did in fact cede Sipadan and Ligitan to Britain (even supposing that the United States considered that it possessed them). At no point did Great Britain make any reference to the fact that the BNBC administered either Sipadan or Ligitan – for the simple reason that it did not, and at no point did the United States state that it intended to cede Sipadan and Ligitan to Britain – for the simple reason that it did not consider the islands to be its to cede, falling as they did beyond the limits of the Sulu Archipelago.

6.66 States cannot be deemed to have ceded territory to another State absent compelling evidence to that effect. Yet the United States never once raised a claim to Sipadan or Ligitan or suggested that it would be willing effectively to trade these islands for others. Indonesia has placed in evidence, at Annexes 12-20 to this Reply a series of correspondence relating to the 1930 Convention which demonstrates that the negotiation of that Convention involved resolving the situation regarding the Turtle Islands and the Mangsee Islands, both of which ultimately fell on the U.S. side of the boundary established by the 1930 Convention. The Convention did not address islands lying to the south of Sibutu and its dependencies where the United States had no claims.

⁶¹ Annex 18 to this Reply, at para. 6.

6.67 The Malaysian Counter-Memorial ends its discussion of the 1930 Convention by posing a hypothetical question. If Indonesia is right, asks Malaysia, "what are the consequences for the group of five islands (Kapalai, Danawan, Si Amil, Ligitan and Sipadan) which lie to the south of the 1930 Convention line, but more than 9 n.m. from the coast of Borneo?"⁶². The answer is straightforward. Sovereignty over these islands had been uncertain before the conclusion of the 1891 Convention between The Netherlands and Great Britain. That Convention resolved the issue by allocating to The Netherlands those islands lying south of the 4° 10' N line of latitude. Islands lying to the north of the 4° 10' N line, such as Kapalai, Dinawan and Si Amil, were allocated to Great Britain.

Section 4. Conclusion

6.68 On careful analysis, therefore, it can be seen that each of the links in Malaysia's chain of title is broken. There is no evidence that the Sultan of Sulu enjoyed sovereignty over either Sipadan or Ligitan. Nor is there any evidence supporting a Spanish claim of title to the islands. Finally, the United States never considered that it was sovereign over the two islands, the United States claims being limited in the south to Sibutu and its dependencies. To succeed in its claim, Malaysia bears the burden of proving that, at each step of the process, title vested in the relevant entity, be it the Sultan of Sulu, Spain or the United States. Malaysia has been unable to support any of these propositions standing alone, let alone to all three of them. It follows that Malaysia's claim based on a so-called treaty title must fail.

⁶² MCM, para. 3.28.

CHAPTER VII

THE ABSENCE OF ANY *DE FACTO* TITLE ACQUIRED BY MALAYSIA

Section 1. Introduction

7.1 In Chapter 3 of its Counter-Memorial, Malaysia asserts its "right to the islands based on actual administration combined with a treaty title"¹. This witnesses a shift of emphasis in Malaysia's position²: while still alleging a title derived from a so-called "Sulu title", Malaysia beats a cautious retreat and puts increasing emphasis on an alleged "continual peaceful administration of the islands, since time immemorial and certainly since the end of the 19th Century by the Sultanate of Sulu, the BNBC, Britain and Malaysia"³.

7.2 Otherwise stated, having realised that its claim to a "chain of title" based on an imaginary Sulu title inherited by Spain, then the United States, then Great Britain, then Malaysia itself is indefensible, Malaysia has turned towards an entirely distinct argument based on *effectivités* and acquisitive prescription. Such an argument is entirely incompatible with Malaysia's maintained allegations that: (i) "There is no suggestion that any of the islands off the east coast of Borneo were, or were ever treated as, *terra nullius*"⁴; and (ii) "This is not just the familiar question which of two States has shown more evidence of administrative and other acts affecting a particular territory or island"⁵.

7.3 Such a claim is also, as has already been explained in Indonesia's Counter-Memorial⁶, quite devoid of any merit on its own. It ignores the fundamental requirements of international law regarding acquisition of territory in the absence of any historical or treaty title: the alleged British and Malaysian practice (discussed in Section 3) lacks the required characteristics to create a right of sovereignty over territory (discussed in Section 2).

¹ MCM, Chapter 3.

² See Chapter IV of this Reply.

³ MCM, para. 4.1.

⁴ *Ibid.*, para. 3.5.

⁵ *Ibid.*, para. 3.29; the footnote referring to the *Minquiers and Ecrehos case, Judgment, I.C.J. Reports 1953*, p. 47 omitted.

⁶ ICM, Chapter VII.

Section 2. The Legal Impossibility of Acquiring a *De Facto* Title by Malaysia

7.4 It is useful to recall the legal situation: the basic point being that no original or subsequent title is vested in Malaysia.

7.5 As regards the first issue, Indonesia has shown in its Counter-Memorial⁷ that Malaysia has not provided any evidence either of any Sulu title relating to the disputed islands prior to 1891, or of any Sulu presence on them. Furthermore, if there had been any activities on Ligitan or Sipadan before that date, neither of the Parties has provided any evidence of it. It could perhaps be inferred from subsequent facts that some Bajau Laut used to fish around the islands or collect turtle eggs on Sipadan but it should be noted that (i) other populations coming from the east coast of Kalimantan also did so (see paragraph 6.9 of Indonesia's Memorial) and (ii) as Indonesia has shown at length in its Counter-Memorial⁸, it cannot be maintained with any conviction that a supposed presence of the Bajau Laut implied any "tie of territorial sovereignty"⁹ over the islands in favour of the Sultanate of Sulu. Moreover, it is interesting to note that Malaysia no longer insists on the "Bajau Laut track" which was so present in its Memorial.

7.6 It goes without saying that, absent an established title, the Sultan of Sulu cannot be said to have ceded whatever title he did not possess, either to Spain or to the BNBC. In this respect, the rather confused "chains of title" successively or jointly invoked by Malaysia do not matter: no title, no "cession". Whether in 1851 (Treaty between Sulu and Spain), or in 1878 (Dent and Overbeck grant), the Sultan of Sulu could not have transferred more territorial rights than what he actually possessed.

7.7 By contrast, Indonesia has shown that the Sultanate of Boeloengan, over which The Netherlands had exercised authority since at least 1834¹⁰, extended along the coast of Sibuko

⁷ *Ibid.*, Chapter III; see also Chapter V of this Reply.

⁸ ICM, paras. 3.23-3.73.

⁹ *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12 at p. 68, para. 162.

¹⁰ See IM, paras. 4.46-4.71

Bay up to Tawau and Batoe Tinagat¹¹, and, in accordance with the concept of territory then recognised in the region¹², this territorial authority extended to surrounding islands (and it must be stressed in this respect that Sipadan and Ligitan lie off Sibuko Bay, not Darvel Bay).

7.8 In any event, contrary to Malaysia's assertion, it is not true that "Indonesia's claim to the islands depends on its showing (a) that the Netherlands had, through Boeloengan, a valid claim to the islands before 1891"¹³. As shown in Chapter I, above, the pre-1891 situation is not decisive: the 1891 Convention was concluded precisely with the view to solve definitely the Anglo-Dutch territorial dispute in the area. As was recalled in the Dutch Explanatory Memorandum, the treaty was concluded "in order to achieve a proper boundary settlement between the Dutch territory in Borneo and that of the British protectorate"¹⁴. And it did – as is explained in Chapter I of this Reply, the 1891 Convention established the course of the dividing line between the Dutch and British possessions in Borneo. As such, it constitutes an indisputable title in favour of each Party to territories lying on each side of the agreed line, "that is, a document endowed by international law with intrinsic legal force for establishing territorial rights"¹⁵. It is both the "actual source" of the respective rights of the Parties and the evidence of the existence of such territorial rights¹⁶. Since both Ligitan and Sipadan lie south of the dividing line established by the Convention, they have clearly been allocated to The Netherlands, to which Indonesia is the successor.

7.9 Therefore, the question is twofold: seen from an Indonesian perspective, it is simply a matter of consolidation of title; but as far as Malaysia is concerned, the question is not of consolidation of title, but of acquisition of territory. Whilst, in the first situation *effectivités*, that is "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region"¹⁷, have a purely confirmatory role, in the second

¹¹ See, for example, paras. 5.20, 5.24 and 5.36 of this Reply, above.

¹² See IM, paras. 4.6-4.18.

¹³ MCM, para. 3.17.

¹⁴ IM, Vol. 3, Annex 77, at p. 123.

¹⁵ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554 at p. 582, para. 54.

¹⁶ See *ibid*, at p. 564, para. 18; see also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment, I.C.J. Reports 1992*, p. 351 at p. 388, para. 45.

¹⁷ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554 at p. 586, para. 63; see also *Land Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment, I.C.J. Reports 1992*, p. 351 at p. 389, para. 45.

hypothesis a complete shift of territorial title from one party (here The Netherlands, then Indonesia) to the other (here, Great Britain, then Malaysia) would be implied. Such a shift cannot be lightly presumed and imposes a much higher burden of proof as Indonesia has shown in its Counter-Memorial¹⁸.

7.10 Related to this is the delicate issue of acquisitive prescription. As Indonesia also noted in its Counter-Memorial, it is highly debatable whether such a concept is generally accepted under international law¹⁹ and Malaysia itself in its Memorial expressly declared that it dismissed such an argument²⁰. However, in its Counter-Memorial, Malaysia seems to go back on this imprudent position and makes the argument that The Netherlands and Indonesia acquiesced in "British and Malaysian administration of the islands in the period from 1891 onwards"²¹.

7.11 In any case, for Malaysia to acquire a title by means of its alleged *effectivités* would suppose, according to the requirements acknowledged by Namibia in the *Kasikili/Sedudu Island* case, that the following conditions are fulfilled:

- "1. The possession of the [...] state must be exercised à titre de souverain.
2. The possession must be peaceful and uninterrupted.
3. The possession must be public.
4. The possession must endure for a certain length of time"²².

7.12 Moreover, the Court, showed some reluctance in applying the doctrine of acquisitive prescription²³ and seems to have added a fifth condition to the introduction of the doctrine into international law: namely that the claim from the State claiming title be accepted by the other State²⁴. This requirement seems to be accepted by Malaysia²⁵.

¹⁸ ICM, paras. 7.3-7.14.

¹⁹ *Ibid.*, para. 7.5 and fn. 6.

²⁰ See MM, para. 6.3.

²¹ MCM, para. 3.17, fn. 52.

²² *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J., 13 December 1999, para. 94.

²³ *Ibid.*, paras. 96 and 97.

²⁴ *Ibid.*, para. 98.

²⁵ See MCM, para. 3.17, fn. 52; see also, para. 7.10, above.

7.13 These strict requirements are necessary in order to maintain legal security and the territorial integrity of States. They are far from satisfied in the present case.

Section 3. The Practice Alleged by Malaysia Lacks the Required Characteristics

7.14 As Indonesia has already recalled²⁶, Malaysia has not shown evidence of *any* activity of Sulu specifically relating to the disputed islands or even to the adjacent coast at any time before the 1891 Convention.

7.15 As regards the colonial and post-independence periods, Indonesia does not deny that Malaysia can invoke some scanty examples of its or its predecessors' activities on or relating to the islands. However, they did not commence before 1917 and they do not constitute the clear pattern of activities *à titre de souverain* required by international law for acquisitive prescription or, even less, for the transfer of a territorial title. This holds true for:

- the so-called "British administration of the islands";
- the maritime claims in the area; and
- the maps invoked by Malaysia.

A. The So-Called "British Administration of the Islands"

7.16 The acts of administration invoked by Malaysia on the islands are the following:

- the Turtle Preservation Ordinance of 1 June 1917²⁷;
- the establishment of a bird sanctuary in 1933²⁸; and
- the construction and maintenance of lighthouses on the islands in the early 1960's²⁹.

²⁶ See, for example, paras. 5.4-5.13 and 5.25-5.36, above.

²⁷ MCM, paras. 4.19-4.22.

²⁸ *Ibid.*, para. 4.23.

²⁹ MM, paras. 6.25-6.29; MCM, para. 4.24.

Whether taken in isolation or globally, these *effectivités* are not of such a nature as to transfer the territorial title acquired by The Netherlands then Indonesia under the 1891 Convention to Great Britain/Malaysia.

7.17 In respect of the collection of turtle eggs on Sipadan, Malaysia's Counter-Memorial does not add any new elements to those considered in its Memorial. Indonesia has answered them in some detail in its Counter-Memorial³⁰, to which it would respectfully refer the Court. Indonesia has shown that:

- the Bajau from Dinawan or the Semporna region were not the only people to fish around the islands and collect turtle eggs on Sipadan;
- the British rules were of a more personal than territorial nature; and
- given the particular nature of the area, local people and administrators were probably confused about the exact limits of respective territorial sovereignty over the small uninhabited islands in the region.

7.18 Moreover, Indonesia has shown that Dutch vessels were cruising around the islands, as shown, for example by the 1910 log-book of HNLMS *Koetei*³¹.

7.19 Indeed, Malaysia now alleges that "The Netherlands authorities did not react to the duly published Ordinance"³². In this regard, it must be recalled that the said Ordinance was published, at least in 1919, in the North Borneo *Official Gazette*. This may make interesting reading, but it can be easily understood that it was not a daily activity of Dutch administrators. Moreover, they had no reason to react since the Ordinance only preserved traditional activities on the island and since fishermen and turtle egg collectors from Indonesia did not face "any problems from anybody" in their traditional activities³³.

³⁰ ICM, paras. 7.15-7.35.

³¹ See ICM, para. 7.47.

³² MCM, para. 4.22.

³³ See ICM, para. 7.28.

7.20 In any case, it must be recalled that the 1921 visit of the Dutch destroyer HNLMS *Lynx* to the area shows that the Dutch had a clear conviction that Ligitan and Sipadan (and not islands lying north of the 4° 10' N parallel) were theirs³⁴. This contrasts with the very abstract "*effectivités*" invoked by Malaysia: on the one hand, we have two isolated acts of legislation; on the other, Indonesia has referred to concrete activities manifested by the physical presence of the Dutch navy, as witnessed by the *Lynx* incident and other naval patrols³⁵.

7.21 It is also significant that Malaysia has failed to produce any actual records of British administration of the islands, even though records were sure to have been kept and Malaysia (and not Indonesia) is well-positioned to have easy access to them. For example, in respect of "the islands which, though on the Philippines side of the boundary [would] continue to be administered by the [BNBC]", the Resident at Sandakan and Kudat was instructed by the BNBC to keep records in respect of "direct revenue derived from these islands", "land affairs" and "any administrative action of particular importance"³⁶. It would clearly follow that similar records would have been kept in respect of the islands falling on the British side of the boundary. However, none has been produced in respect of Sipadan or Ligitan, at least prior to 1917.

7.22 Similarly, records relating to the operations of the Borneo Fishing Company on Si Amil run by a Captain Orita indicate that Sipadan and Ligitan did not fall within the area administered by the BNBC. As appears in the annexed notes from the Tawau Resident's Office dating from 1931³⁷, Captain Orita argued that two such fishing businesses could not be supported in the area around Si Amil, and that he should consequently be granted the sole and exclusive right to collect bait on Si Amil and surrounding islands. However, his application was to collect bait only "on the islands of Kapalai, Danawan, Si Amil, Mabul, Pulau Gaya, Omadal, Pom Pom + Mataking"³⁸, i.e. including all the islands in the area around Si Amil, but not Sipadan and Ligitan. The clear inference from this omission would be that he did not consider these islands as falling with the BNBC's jurisdiction.

³⁴ See IM, paras. 3.72-3.74 and 6.2-6.5; ICM, para. 7.51, and paras. 3.2-3.7 of this Reply, above.

³⁵ See above, paras. 3.2-3.7 and 7.18.

³⁶ See minute paper from file *North Borneo-Philippines Boundary Treaty (168/30)* from the Tawau Resident's Office archives, dated 28 April 1930, at Annex 21 to this Reply.

³⁷ Annex 22 of this Reply.

³⁸ *Ibid.*, para. 11.

7.23 A clear conclusion may be drawn from this situation: to paraphrase the findings of the Arbitral Tribunal in the case concerning the *Laguna del Desierto* between Argentina and Chile:

"[...] given the nature of the acts which [Malaysia] claims to have carried out in the disputed sector, it would be unreasonable to infer any decisive consequences from the absence of protest on the part of the [Dutch then Indonesian Governments], particularly in view of the confidence which the latter was entitled to place in the [territorial title it held from the 1891 Convention]"³⁹.

7.24 The same holds true as regards the "notification" of a bird sanctuary in the *Official Gazette* of 1 February 1933⁴⁰. Moreover, as Indonesia noted in its Counter-Memorial⁴¹, the illustrating official British map drawn after this "notification" clearly shows Sipadan lying outside the British administrative boundaries⁴².

7.25 As regards the construction and maintenance of lighthouses on Ligitan and Sipadan, it must be recalled⁴³ that:

- both lighthouses are very light structures made of metal bars;
- Malaysia is most discreet as to the dates and circumstances of their building; and
- "The operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty"⁴⁴.

7.26 It should also be mentioned that in the region there is at least one clear precedent of such a dissociation between the construction and maintenance of a lighthouse and territorial sovereignty: on 11 April 1927 a letter was sent from the Division of Far Eastern Affairs of the

³⁹ *Dispute concerning the Course of the Frontier between BP 62 and Mount Fitzroy (Argentina/Chile) ("Laguna del Desierto")* ILR 113, p. 79, para. 169. See also case concerning *Kasikili/Sedudu Island*, *op. cit.*, paras. 98-99 and *Eritrea/Yemen Arbitration, Award of the Arbitral Tribunal in the First State of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, pp. 84-85, para. 315, both of which are referred to at ICM, paras. 7.26-7.27.

⁴⁰ MM, Vol. 4, Annex 101.

⁴¹ ICM, para. 7.37.

⁴² MM, Map 13 of the Map Atlas.

⁴³ ICM, paras. 7.39-7.43.

⁴⁴ *Eritrea/Yemen Arbitration, Award of the Arbitral Tribunal in the First State of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, *op. cit.*, p. 87 at para. 328.

U.S. State Department to the Secretary of State, to which a letter from Frank Kellogg to the U.S. President was attached. In the latter letter Frank Kellogg referred to the fact that the Turtle Islands, which were then *de facto* administered by the BNBC (see paragraph 6.49, above), fell under U.S. sovereignty and noted that the United States "would agree (1) to permit the British North Borneo Company to operate a lighthouse which the Company had erected on Taganac Island, one of the islands of the Turtle Group"⁴⁵. Even though it seems that the matter was not followed up, this at least shows that both Britain and the United States shared the conviction that building and operating lighthouses is not necessarily linked to State sovereignty. Moreover, it is Indonesia's understanding that Malaysia's case in its dispute with Singapore concerning Pulau Pisang (Pedra Branca) is that this small island in the Singapore Straits is under Malaysian sovereignty although the lighthouse on it was erected and is maintained by Singapore.

7.27 In the same vein, but more generally, another fact is striking: most of the *effectivités* invoked by Malaysia, and particularly the Turtle Preservation Ordinance of 1 June 1917 relate to the period between 1917 and 1930. Given the important change in Malaysia's argument (see Chapter IV, above), this point is of some importance.

7.28 The Parties now agree "that Sipadan and Ligitan fell outside the terms of the Sulu grant of 1878 because they were outside the 9 nautical mile line"⁴⁶. This means that, the scanty activities conducted in relation to the islands by the BNBC, consequently Great Britain, before the alleged "relinquishment" of sovereignty by the United States to Great Britain, were performed without any valid title. In other words, the BNBC and Great Britain merely (and scarcely) acted as an "occupier without a title" (*occupant sans titre*). All these pre-1930 acts were therefore by definition *not* acts of an authority in exercise of rights of sovereignty, and consequently they can have no legal effect to confirm or indeed to establish title, which Malaysia concedes Great Britain did not possess.

⁴⁵ P. 3 of Frank Kellogg's letter to the U.S. President at Annex 13 to this Reply; see also the Foreign Office Memorandum dated 13 July 1929 at Annex 16 and para. 3 of the Exchange of Notes between Sir Esme Howard, the British Ambassador in Washington, and Mr. Stimson, the U.S. Secretary of State, dated 2 January 1930 at Annex 20.

⁴⁶ MCM, para. 3.6.

7.29 When these few irrelevant acts are discounted (which, from a legal perspective, they must be), the so-called "British administration" of the islands is reduced to virtually nothing and is certainly incapable of creating any territorial title.

B. The Irrelevance of Maritime Claims in the Area

7.30 In its Counter-Memorial, Malaysia again harps on the fact that Indonesia, in promulgating a system of straight baselines in its internal legislation (Act No. 4 of 1960), did not use Sipadan or Ligitan as basepoints⁴⁷. Malaysia even goes so far as to try to elevate this alleged "practice" on the part of Indonesia to an element partaking of the definition of *uti possidetis*⁴⁸.

7.31 Malaysia's arguments are based on a clear double standard. While Malaysia criticises Indonesia for not including the two islands in its original system of straight baselines, Malaysia passes over in silence the fact that it, too, did not use either Sipadan or Ligitan as basepoints for its own maritime claims until well after the dispute had emerged between the Parties in 1969.

7.32 Indonesia has fully explained in its Memorial the circumstances in which Act No. 4 was enacted in 1960⁴⁹. Indonesia in fact neglected to use a whole series of islands for its archipelagic baseline claim in this legislation. A number of such islands were subsequently recognised by Malaysia to fall under Indonesian sovereignty and as appropriate basepoints.

7.33 As for Malaysia's own conduct, it will be recalled that, prior to the negotiations between the Parties in September 1969 during which Malaysia laid claim to Sipadan and Ligitan for the first time, Malaysia had itself enacted legislation governing its territorial sea and contiguous zone. This was Ordinance No. 7 of 2 August 1969, a document which surprisingly Malaysia has not seen fit to annex to its written pleadings⁵⁰.

⁴⁷ MM, paras. 4.25-4.31.

⁴⁸ *Ibid.*, para. 4.25.

⁴⁹ IM, paras. 8.10-8.12 and see the affidavit prepared by Admiral Sumardiman on this issue (IM, Vol. 5, Annex B).

⁵⁰ A copy of this law may be found at IM, Vol. 4, Annex 137.

7.34 Article 3 of Ordinance No. 7 established the breadth of Malaysia's territorial sea as twelve nautical miles. There was no suggestion that such a territorial sea applied to the islands of Sipadan or Ligitan. Instead, Article 5 of the law stipulated that "[s]o soon hereafter as may be possible" Malaysia would issue a large-scale map indicating the low-water mark of its coast, its baselines and the outer limits of its territorial waters. Article 5 went on to provide that a copy of such map would be published in the *Malaysian Gazette*.

7.35 No such map was published at that time. Indeed, it was not until 1979, ten years after this dispute had arisen, that Malaysia issued a map which, for the first time, included Sipadan and Ligitan within Malaysia's maritime claims. Prior to 1979, Malaysia's maps had repeatedly depicted the 4° 10' N line extending east of the Island of Sebatik as the limit of its jurisdiction.

7.36 The 1979 map was promptly protested by Indonesia not simply as an encroachment on Indonesia's territory and sovereign rights, but also as a fundamental violation of the *status quo* arrangement agreed between the Parties during their 1969 negotiations⁵¹. Indonesia has already commented on the fact that a fundamental and self-serving change in one party's official cartography after a dispute has emerged constitutes a compelling ground for disregarding such subsequent practice⁵².

7.37 It can thus be seen that neither Indonesia's Act No. 4 nor Malaysia's Ordinance No. 7 have any real bearing on the case. What is relevant, on the other hand, is the pattern of conduct engaged in by *both* Parties before the dispute emerged – and by Malaysia in the ten year period after the dispute had arisen – which consistently treated the 4° 10' N line as a dividing line extending out to sea to the north of the islands. This conduct has been reviewed in Chapter III above.

⁵¹ In contrast to Malaysia's self-serving activities with respect to the disputed islands, Indonesia has scrupulously respected the *status quo* agreement.

⁵² IM, paras. 8.59-8.69.

C. The Maps Invoked by Malaysia

7.38 In its Memorial and Counter-Memorial Malaysia has invoked a number of maps which it claims support its position.

7.39 Indonesia has already commented fully on the maps relied upon by Malaysia in its Memorial: see paragraphs 7.70 to 7.93 and the Map Annex of Indonesia's Counter-Memorial. As regards the further maps submitted by Malaysia with its Counter-Memorial, Indonesia has commented on them individually at the Map Annex attached to this Reply. Suffice it at this stage to posit a few general conclusions regarding the map evidence invoked by Malaysia in these proceedings in alleged support of its position.

7.40 Firstly, the map evidence submitted by Malaysia is characterised by significant omissions. Thus, whereas Indonesia has been able to point to maps that clearly show that the parties to the 1891 Convention intended that the agreed line should extend offshore⁵³, Malaysia has provided no evidence to the contrary. This conclusion is fully supported by the Dutch Explanatory Memorandum Map which was known to and acquiesced in by the British⁵⁴, providing strong evidence that it was the contemporaneous intention of both Dutch and British parties to the 1891 Convention that the 4° 10' N line should continue eastwards of Sebatik.

7.41 Second, Indonesia has assembled a number of maps prepared by Edward Stanford, the BNBC official cartographer, on which a red dotted line was plotted along the 4° 10' N parallel after, but not before, 1891, reflecting the clear understanding on the part of the BNBC that the Convention line represented the limits of its jurisdiction. Malaysia has adduced no maps that demonstrate the contrary. Malaysia has adduced some maps on which no offshore boundary is indicated (for example the Dutch 1913 map of the Southern and Eastern Division of

⁵³ See IM, paras. 5.20 and 5.23(a); ICM, paras. 5.70 *et seq.*

⁵⁴ See paras. 2.30-2.32, above.

Borneo⁵⁵, the 1913 Dutch map of the Administrative Structure of the Southern and Eastern Borneo Residence⁵⁶ and the 1906 Stanford map⁵⁷). However, if these maps are considered in any detail it is readily apparent that the maps were only intended to depict boundaries on the mainland of Borneo. This is especially true with maps prepared by the Netherlands East Indies Topographical Office where standard practice was not to depict offshore boundary lines.

7.42 As regards the other maps adduced by Malaysia, dating from the later colonial and post-colonial periods, they are discussed individually in the Map Annexes to Indonesia's Counter-Memorial and this Reply. In this section it needs only to be recalled that, as explained elsewhere, these maps are contradictory and support neither the alleged Spain-United States-Great Britain chain of title⁵⁸, nor Malaysia's assertion that the islands have been continually administered by Malaysia or its predecessors in title since the end of the 19th century (or indeed before).

7.43 Malaysia places great emphasis on the map attached to the 1915 Convention. However, as explained at paragraphs 2.42-2.47 above, neither the Convention, the map attached to it, or the 1913 Commission had any bearing with regard to the boundary east of Sebatik Island.

7.44 Malaysia appears to contend that a number of maps support its position for the simple reason that no offshore line is depicted on them. However, Malaysia misses the point: such maps are inconclusive for the simple reason that they do not attribute the islands lying east of Sebatik to one party or the other; they are entirely neutral. Moreover, these maps are greatly outweighed by the large number of maps discussed in Chapter III, on which the 4° 10' N Convention line is consistently depicted as continuing out to sea.

7.45 To conclude, whereas the maps relied upon by Malaysia do not support either of the central elements of its case, Indonesia has adduced a significant body cartographical evidence

⁵⁵ MM, Map Atlas, Map 1.

⁵⁶ MCM, Insert 11.

⁵⁷ MM, Map Atlas, Map 6.

⁵⁸ In respect of the U.S. H.O. Chart 2117, so heavily relied upon by Malaysia, which was in fact expressly withdrawn upon the Secretary of State's instructions, see paras. 6.28-6.39, above.

which demonstrates that before, during and after the conclusion of the 1891 Convention, the parties to the Convention clearly intended that the 4° 10' N Convention line should continue offshore, and that this understanding has been consistently reflected in subsequent maps prepared by both sides throughout the 20th century.

SUBMISSIONS

On the basis of the considerations set out in this Reply, the Government of the Republic of Indonesia requests the Court to adjudge and declare that:

- (a) sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and
- (b) sovereignty over Pulau Sipadan belongs to the Republic of Indonesia.

.....

Dr. N. Hassan Wirajuda
Agent of the Republic of Indonesia

MAP ANNEX

COMMENTS ON MAPS SUBMITTED WITH MALAYSIA'S COUNTER-MEMORIAL

1. In the Map Annex to Indonesia's Counter-Memorial, the maps submitted by Malaysia with its Memorial were discussed individually. Malaysia has since submitted a number of further maps, the relevance of which Indonesia will rebut here.

Section 1. Discussion of Individual Maps

A. Survey Map of Netherlands East Indies Archipelago (1897-1904), Topographical Bureau at Batavia¹

2. With regard to this map, Malaysia states, that "the detail on the map is sufficiently clear to show the land boundary coming in from the west to cross the island of Sebatik and terminating at its east coast. There is no extension seaward. The orange line represents the district boundary. The small dots or crosses that appear in the sea just east of Sebatik are sandbanks and reefs. The map carries no suggestion of the existence of any Dutch claim to sovereignty over any islands east of Sebatik"².

3. However, upon close examination of the map annexed by Malaysia in Volume 2 of its Counter-Memorial (the colouring of the extract at Insert 10 is somewhat distorted), it can be seen that the red boundary line does not terminate at the east coast of Sebatik, but continues seaward, gradually merging into the orange line that continues through the Celebes Sea. Although it is unclear from the map whether the line falls to the north or south of Sipadan and Ligitan, it is clear that it was understood that the boundary line which divided Sebatik Island should continue eastwards out to sea beyond the eastern limit of the island.

¹ MCM, para. 5.13, Insert 10 and Vol. 2, Map 1.

² *Ibid.*, para. 5.13.

B. 1905 and 1915 Nautical Charts of the East Coast of Borneo³

4. Malaysia has further annexed two nautical charts of the east coast of Borneo, apparently incorporating information gathered in a survey by the Dutch ship, the *Macasser*.

5. As stated in Indonesia's Counter-Memorial⁴, there is clear authority for the position that nautical charts are generally prepared for shipping purposes only, and that any boundaries indicated are to be accorded no significance. The only possible significance of these charts is that they appear to confirm that Dutch ships (the *Macasser* in particular) did carry out surveying operations in the area around Sipadan and Ligitan, which attracted no protest from the British.

C. Map Accompanying Government East Indies 1913 Formal Decision on the Administrative Structure of the Southern and Eastern Borneo Residence⁵

6. This map shows what appears to be a boundary line, marked in red, extending along the 4°10' N parallel across Sebatik Island until the eastern terminus (no legend is marked on the extract reproduced by Malaysia). The islands of Sipadan and Ligitan are not marked.

7. However, it should be noted that a number of other islands were also not marked on this map, for example Pulau Pandjang, Pulau Marathea and Pulau Kakaban⁶, islands lying off the Batoe headland in an area covered by the map and which were indisputably Dutch. The map is consequently quite inconclusive as regards sovereignty over any of the Dutch islands.

³ *Ibid.*, para. 5.14 and Vol. 2, Maps 2 and 3.

⁴ ICM, Map Annex, paras. A.4-A.5.

⁵ MCM, para. 5.15 and Insert 11.

⁶ These islands are marked on the 1913 Netherlands Indies map at MM, Map Atlas, Map 1.

D. Sheet NA-50, "Oost Borneo" compiled and printed by the Topografische Dienst, Batavia in 1935⁷

8. Malaysia considers the "particular significance" of this map being that part of the mainland of Dutch Borneo is depicted beyond a "border break" at the top of the page, but a similar break had not been added to include the islands of Sipadan and Ligitan.

9. Malaysia states that that the "border break" had been added "in order to complete the coverage of Dutch territory without publishing the next adjacent sheet to the north". No basis for this speculative statement is given – the reasoning is entirely self-serving. The only relevant point is that the area in which Ligitan and Sipadan fell was not included within the page frame. The map cannot be regarded as conclusive as to territories not covered by its scope.

E. Map 25 of Atlas of the Tropical Netherlands Prepared by the Royal Geographical Society of The Netherlands with the Topographical Service of the Netherlands East Indies, published in 1938⁸

10. On this map an insert of the town of Balikpapan has been imposed over the area off Semporna in which Sipadan and Ligitan lie. Malaysia seems to infer that this has been done intentionally as an indication that the islands were not regarded as Dutch. However, this is pure conjecture, the relevant point being that the map does not show the area including the islands in question. Indonesia further points out that other small Dutch islands are not shown on the map, e.g. Pulau Raboe Raboe, Pulau Derawan and others lying off the Batoe headland. The failure to include small islands within the scope of the map can thus have no bearing as to their sovereignty.

⁷ MCM, para. 5.16, Insert 9 and Vol. 2, Map 5.

⁸ *Ibid.*, para. 5.17, Insert 12 and Vol. 2, Map 6.

F. Sheet Noord (North) B-50, "North Borneo", Produced by the Topografische Dienst, Batavia in 1941⁹

11. Malaysia's main point regarding this map is that since Sipadan and Ligitan are followed by the letter "I" (for "island"), and not preceded by the letter "P" (for "Pulau"), they are being designated as British rather than Dutch.

12. This flimsy reasoning is unsupported by any legend, and is undermined by the fact that Sebatik is also preceded by the letter "P" even though half of it was British. Indonesia would also point out that these terms have been used inconsistently elsewhere, such as on the Stanford maps discussed in Chapter IV, where the islands lying off the Dutch coast are alternately designated "Island" and "Pulo".

13. It should also be pointed out that no indication for the source of this map has been given. It was prepared during the Second World War, shortly before the Japanese occupation of Indonesia. Given its secret status and the wartime circumstances of its production, it would be inappropriate to draw any conclusions regarding sovereignty from it.

G. Map "Kalimantan Utara", from the International Map of the World Series, Jakarta, 1965¹⁰

14. Malaysia notes that this map was a copy of the 1941 map, discussed above, with the salient difference being that the border across Sebatik has been extended out to sea, although not as far as Sipadan and Ligitan.

15. However, Malaysia fails to acknowledge the significance of this line; it clearly reflects an understanding that the boundary line extended seawards along the 4° 10' N parallel. It should also be noted that the border between the Philippines and Sabah is similarly only depicted by a broken line.

⁹ *Ibid.*, para. 5.18, Insert 13 and Vol. 2, Map 7.

¹⁰ *Ibid.*, para. 5.26, Insert 14 and Vol. 2, Map 8.

H. 1968 Edition of "Kalimantan Utara"¹¹

16. This map, also from the International Map of the World Series, is almost identical to the 1965 map of "Kalimantan Utara", discussed above. Again, the important point of the map is that it shows the border between Malaysia and Indonesia extending seawards along the 4° 10' N parallel.

17. This is confirmed by the General Map of the area depicted next to the legend (at Map 9, not reproduced by Malaysia in Insert 15). On this map, the seaward boundary is indicated by a continuous line extending well to the east of the area encompassing the islands. Although the scale of this map is far too small to indicate the islands, this line shows quite clearly an understanding that the boundary between Indonesia and Malaysia extended eastwards from Sebatik Island.

I. 1976 Edition of Sheet NB 50, "Bandar Seri Begawan", Printed in 1977¹²

18. Malaysia focuses on the extract of this map, prepared after this dispute crystallised, which it has reproduced as Insert 16 on which the offshore boundary line between Indonesia and Malaysia is not depicted.

19. However, Malaysia has ignored the small map of the "Administrative Area", next to the legend reproduced at Map 10 and not on the insert, which shows the international boundary clearly: it is represented by a continuous line that extends seawards along an approximation of the 4° 10' N parallel from Sebatik Island well beyond the islands in dispute.

¹¹ *Ibid.*, para. 5.27, Insert 15 and Vol. 2, Map 9.

¹² *Ibid.*, para. 5.28, Insert 16 and Vol. 2, Map 10.

J. "Sibatik Land Systems and Land Suitability", Produced Jointly by U.K. and Indonesian Land Evaluation Authorities in 1987¹³

20. Malaysia then exhibits a map, drawn up well after this dispute crystallised for use in land systems and suitability analysis, which bears the disclaimer, "This map must not be considered an authority on the delineation of international and other boundaries".

21. The map, which is of a limited part of north-east Borneo, does not appear to extend as far eastward as Sipadan and Ligitan, which are not marked. However, the map does show the international boundary line extending eastwards from Sebatik Island along the 4° 10' N parallel. Malaysia provides no explanation for this line. It would clearly seem to reflect an understanding that the 4° 10' N boundary adopted in the 1891 Convention extended out to sea.

K. Map of Kalimantan, 1992¹⁴

22. Finally, Malaysia has introduced a commercially produced map, dating from well after the crystallisation of this dispute, on which a line is drawn continuing eastwards from Sebatik Island, although following a course that appears to lie slightly south of the 4° 10' N parallel.

23. The map clearly was not intended to be relied upon for geographical accuracy - a number of small islands are not marked (including Sipadan and Ligitan), and no indication is given for the position of the red line. However, the map gives the clear impression that some sort of boundary line ran eastwards from Sebatik Island. The only possible explanation for this line is that it approximated to that adopted in the 1891 Convention, as is marked on numerous other maps.

¹³ *Ibid.*, para. 5.29 and Vol. 2, Map 11.

¹⁴ *Ibid.*, para. 5.30, Insert 17 and Vol. 2, Map 12.

Section 2. Conclusions

24. In the body of this Reply, Indonesia has discussed the significance of the maps submitted in the course of these proceedings which support Indonesia's position¹⁵. As Indonesia has shown, there is a substantial body of map evidence, whether dating from around the time of the 1891 Convention or subsequently in the colonial and post-colonial periods which shows clearly that both Parties and their predecessors in title have consistently understood that the 4° 10' N line agreed upon the 1891 Convention extended out to sea, thereby serving as a line of allocation in respect of Sipadan and Ligitan (and other islands in the area).

25. To the contrary, the maps relied upon by Malaysia in support of its position are inconclusive. In respect of those maps submitted with Malaysia's Memorial, Indonesia refers to the comments contained in the Map Annex attached to its Counter-Memorial. As regards the further maps submitted with Malaysia's Counter-Memorial, as has been shown in this Map Annex, they are either quite inconclusive, or, in fact, support Indonesia's position.

¹⁵ See Chapter III, Section 5 of this Reply; see also IM, paras. 6.30-6.79, ICM, paras. 7.70-7.93 and Map Annex.

CERTIFICATION

I have the honour to certify the accuracy of the translations into English made by Indonesia which appear in the Reply and its Annexes. I also certify that the documents annexed are true copies and conform to the original documents.

.....

Dr. N. Hassan Wirajuda
Agent of the Republic of Indonesia

LIST OF ANNEXES

(Volume 2)

1. *Aanteekeningen omtrent de Noordoostkust van Borneo* (Notes concerning the North-East Coast of Borneo) by H. von Dewall, from *Tijdschrift voor Indische Taal-, Land- en Volkenkunde*, Deel IV, Nieuwe Serie, Deel I, 1855, pages 423-427, with English translation.
2. Letter from Sir Rutherford Alcock, British North Borneo Company to Sir Julian Pauncefote, Foreign Office dated 11 January 1884, with enclosures.
3. Manuscript copy of despatch from Sir Horace Rumbold to the Marquis of Salisbury, dated 26 January 1892, with receipt slip.
4. British Admiralty Pilot for the Eastern Archipelago, 2nd Edition, 1902.
5. Letter from John Hay, Department of State to the Secretary of the Navy dated 3 April 1903, with endorsements.
6. Letter from Major E.R. Hills, Acting Assistant Adjutant General, War Department to the Commanding General, Division of the Philippines dated 12 May 1903.
7. Telegraphic note from Governor Birch to the British North Borneo Company dated 22 June 1903.
8. Letter from Robert Shaw Oliver, Acting Secretary of War to the Secretary of State dated 23 [20] October 1903.
9. Letter from William M. Moody, Secretary, Navy Department to the Commander-in-Chief, U.S. Asiatic Fleet dated 31 December 1903.
10. Report from H.W.H Bunbury and G.St.V. Keddell, Commissioners, to the Government Secretary, Sandakan dated 24 February 1913.
11. Letter from Governor of British North Borneo to Secretary of the British North Borneo Company dated 11 March 1913.
12. Letter from Frank Kellogg, Department of State to Sir Esme Howard dated 21 April 1925.
13. Letter from Division of Far Eastern Affairs, Department of State to the Secretary of State dated 11 April 1927, with attached letter from Frank Kellogg to the U.S. President.
14. Letter from Frank Kellogg, Department of State to Sir Esme Howard dated 20 August 1927.

15. Letter from J.L. Humphreys, Governor, Sandakan to the President of the British North Borneo Company dated 4 February 1929 with attached memorandum.
16. Foreign Office memorandum dated 13 July 1929.
17. Copy of section of chart of Philippine Islands, Southwestern Part, H.O. Chart 4707.
18. Letter from Sir Esme Howard to Arthur Henderson M.P. dated 6 August 1929.
19. Undated BNBC memorandum entitled 'North Borneo-Philippines Boundary'.
20. Exchange of Notes between Sir Esme Howard and Mr. Stimson dated 2 January 1930.
21. Minute paper of Resident at Sandakan and Kudat on North Borneo - Philippines Boundary Treaty dated 28 April 1930.
22. Notes of Tawau Resident regarding application by Captain Orita for a permanent lease on Si Amil and sole right to obtain bait on certain islands off the East Coast of Borneo, March - April 1931.
23. Recent diplomatic correspondence concerning the activities of oilrig Sedco 601.
24. Atlas front-sheet and map of Borneo from Stanford's *London Atlas of Universal Geography*, 1887.
25. Atlas front-sheet and map of Borneo from Stanford's *London Atlas of Universal Geography*, 1894.
26. Atlas front-sheet and map of Borneo from Stanford's *London Atlas of Universal Geography*, 1904.
27. Plate 19 of *Dornseiffen's Atlas van Nederlandsch Oost- en West Indie*, Seyffardt's Booksellers, Amsterdam, 1894
28. *Munrechteluke Kaart Administratie Tarakan*, 1 April 1939, with translation of title and legend.